BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

ROBERT "BOB" BURNS – Chairman
BOYD DUNN
SANDRA D. KENNEDY
JUSTIN OLSON
LEA MÁRQUEZ PETERSON

IN THE MATTER OF:

PERFORMANCE ARBITRAGE COMPANY, INC., a Delaware corporation,

MICHELLE PLANT, an Arkansas resident,

FINANCIAL PRODUCT DISTRIBUTORS, LLC, a Delaware limited liability company,

MICHAEL DAVID WOODARD (CRD # 3270674) and DEBORAH G. WOODARD, husband and wife, residents of Texas,

MARK CORBETT a resident of California,

UPSTATE LAW GROUP, LLC, a South Carolina limited liability company, and

CANDY KERN-FULLER, a South Carolina resident,

Respondents.

DOCKET NO. S-21049A-18-0223

DECISION NO. 77806

OPINION AND ORDER

DATES OF HEARING: August 19, 20, 21, 22, 23, 26, 27, 28, 29, and 30, 2019

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Mark Preny

APPEARANCES: Mr. Robert Zelms and Ms. Samantha Kattau, MANNING & KASS, ELLROD, RAMIREZ, TRESTER, LLP, on behalf of Respondents Upstate Law Group and Candy Kern-Fuller;

Michelle Plant, *pro per*; and

Mr. Jamie Burgess and Mitchell Allee, Staff Attorneys, Securities Division of the Arizona Corporation Commission.

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BY THE COMMISSION:

Procedural History

On June 29, 2018, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties and Order for Other Affirmative Action ("Notice") against Performance Arbitrage Company, Inc., ("PAC"), Michelle Plant, Financial Product Distributors, LLC, ("FPD"), Michael David Woodard and Jane Doe Woodard (the "Woodards"), Mark Corbett and Jane Doe Corbett (the "Corbetts"), Upstate Law Group, LLC, ("ULG") and Candy Kern-Fuller (collectively "Respondents"), in which the Division alleged violations of the Securities Act of Arizona, A.R.S. § 44-1801 et seq. ("Securities Act"), which resulted in the opening of this docket.

The spouse of Michael David Woodard, Jane Doe Woodard ("Woodard Spouse") and the spouse of Mark Corbett, Jane Doe Corbett ("Corbett Spouse") (collectively "Respondent Spouses") are joined in the action pursuant to A.R.S. § 44-2031(C) solely for the purpose of determining the liability of the respective marital communities.

On July 19, 2018, Respondents ULG and Candy Kern-Fuller filed a Request for Hearing and Prehearing Conference pursuant to Arizona Administrative Code ("A.A.C.") Rule R14-4-306(B).

On July 23, 2018, Respondent Mark Corbett filed an Answer.

On July 31, 2018, by Procedural Order, a pre-hearing conference was scheduled in this matter for August 27, 2018.

On August 10, 2018, Respondents ULG and Candy Kern-Fuller filed a Motion for Extension of Time to file their answer. Respondents ULG and Ms. Kern-Fuller contended that they had tendered their defense of this matter to their insurance carrier, which they expected to assign counsel. Respondents ULG and Ms. Kern-Fuller requested that they be given until September 17, 2018, to file their answer. Respondents ULG and Ms. Kern-Fuller asserted that they had informed the Securities Division and that counsel for the Division did not oppose the Motion for Extension of Time.

On August 14, 2018, by Procedural Order, Respondents ULG and Candy Kern-Fuller's Motion for Extension of Time was granted.

On August 27, 2018, the pre-hearing conference was held as scheduled. The Division appeared through counsel, as did Respondents ULG and Candy Kern-Fuller. The scheduling of a hearing was discussed and agreed to commence on April 15, 2019.

Also on August 27, 2018, by Procedural Order, a hearing was set in this matter to commence on April 15, 2019.

On September 17, 2018, Respondents ULG and Candy Kern-Fuller filed their Answer.

On February 13, 2019, Respondents ULG and Candy Kern-Fuller filed a Motion for Prehearing Conference and to Vacate Hearing Dates ("Motion to Vacate Hearing"), stating that both Respondents and Respondents' counsel are set for trial in other matters that cannot be rescheduled.

On February 14, 2019, Respondents ULG and Candy Kern-Fuller filed their List of Witnesses and Exhibits.

On February 19, 2019, the Division filed its Response to Motion for Prehearing Conference and to Vacate Hearing Dates, stating their objection to the Motion to Vacate Hearing. The Division contended that ULG and Ms. Kern-Fuller had failed to establish good cause to vacate the hearing dates.

Also on February 19, 2019, by Procedural Order, a procedural conference was set for March 11, 2019, to discuss the Motion to Vacate Hearing.

On March 4, 2019, ULG, Candy Kern-Fuller, and the Division filed a Joint Stipulation Regarding Motion for Pre-Hearing Conference and to Vacate Hearing Dates ("Joint Stipulation"). The Joint Stipulation stated that the Division withdraws its objection to the Motion to Vacate Hearing. The Joint Stipulation further stated that ULG, Ms. Kern-Fuller, and the Division request that the hearing scheduled to commence on April 15, 2019, be vacated and reset to begin on August 19, 2019.

Also on March 4, 2019, by Procedural Order, the procedural conference set for March 11, 2019, and hearing set to commence on April 15, 2019, were vacated.

On May 24, 2019, ULG, Candy Kern-Fuller, and the Division filed a Joint Motion for Leave to Amend to allow the Division to file an Amended Notice of Opportunity for Hearing, to incorporate claims in this case that the Division, ULG, and Ms. Kern-Fuller sought to be dismissed without prejudice from a related action, *BAIC, Inc., et al.*, Docket No. S-21044A-18-0071.

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On May 28, 2019, by Procedural Order, the Joint Motion for Leave to Amend filed by ULG, Candy Kern-Fuller, and the Division was granted.

On the same date, a Procedural Order regarding efiling was issued.

On June 18, 2019, the Division filed a Notice of New Address for Respondent Mark Corbett.

On June 27, 2019, Respondents ULG and Candy Kern-Fuller filed an Application for Administrative Hearing Subpoena.

On July 8, 2019, the Division filed an Amended Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties and Order for Other Affirmative Action ("Amended Notice"). Among other changes, the Amended Notice identified Deborah G. Woodard as the spouse of Michael David Woodard and acknowledged that Mark Corbett is not married.

On the same date, the Division filed a Motion for Leave to Present Telephonic Testimony. The Division requested that seven investor-witnesses, who reside approximately 115 miles away from Phoenix, be permitted to testify telephonically at the hearing.

On July 12, 2019, the Division filed a Motion to Quash Subpoena. The Division contended that the Subpoena for the production of documents served on the Division's expert witness should be quashed because: 1) the Commission lacks jurisdiction to subpoena an out-of-state witness; 2) the Subpoena was issued without a finding of reasonable need pursuant to the Administrative Procedures Act; 3) the expert's report complies with Rule 26.1(d)(4) of the Arizona Rules of Civil Procedure; 4) the Division has voluntarily produced all discoverable material; and 5) the Subpoena is overbroad, vindictive, and an abuse of process.

On July 16, 2019, the Division filed Notice of Errata Regarding its Motion to Quash Subpoena.

On July 18, 2019, the Division filed a Motion to Exempt Expert Witness from Exclusion Under Rule 615. The Division contended that the presence of its expert witness throughout the hearing will be essential to the Division's presentation of its case. The Division requested an expedited ruling to allow for travel plans of its expert witness.

On July 19, 2019, by Procedural Order a telephonic procedural conference was scheduled for July 24, 2019.

On July 24, 2019, the telephonic procedural conference was held as scheduled. The Division, ULG, and Ms. Kern-Fuller appeared through counsel. The parties discussed the Division's Motion for Leave to Present Telephonic Testimony, the Division's Motion to Quash Subpoena, and the Division's Motion to Exempt Expert Witness from Exclusion Under Rule 615. ULG and Ms. Kern-Fuller stated they did not oppose the Division's motions. The parties discussed a deadline to disclose supplements to their Exhibits and Witness Lists.

On July 25, 2019, by Procedural Order, the Division's Motion for Leave to Present Telephonic Testimony, Motion to Quash Subpoena, and Motion to Exempt Expert Witness from Exclusion Under Rule 615 were granted.

On August 5, 2019, Respondents ULG and Candy Kern-Fuller filed an Answer to the Amended Notice of Opportunity for Hearing.

On August 7, 2019, Respondent Michelle Plant filed her Answer.

Also on August 7, 2019, Respondent Michelle Plant filed a Pro Se Motion for Telephonic Appearance. Ms. Plant requests to appear telephonically for the hearing as an in-person appearance would be unduly burdensome as she resides over 1,100 miles from Phoenix, she has family caregiving requirements, and she lacks the funds for travel and lodging expenses associated with a two-week hearing. Ms. Plant advances legal argument in favor of telephonic testimony as support for her to appear telephonically at the hearing.

On August 13, 2019, the Division filed its Response to Motion for Telephonic Appearance by Michelle Plant, stating that the Division does not oppose, subject to provisions. The Division contends that the hearing should proceed as if Ms. Plant was present and that Ms. Plant should appear via a separate phone line so as not to be permitted to interact with investor witnesses. The Division also asserts that Ms. Plant's Pro Se Motion for Telephonic Appearance incorrectly describes service of the Notice and the Amended Notice.

On August 14, 2019, by Procedural Order, Respondent Michelle Plant's Motion for Telephonic Appearance was granted and the hearing dates commencing August 19, 2019, were affirmed.

On August 16, 2019, the Division filed Notice of Filing Supplemental Exhibits.

On August 16, 2019, Michelle Plant filed a Motion for Continuance.

On August 16, 2019, the Division filed a Response to Respondent Michelle Plant's Motion for Continuance.

On August 16, 2019, Respondents ULG filed a Motion to Exclude the Division's Exhibits S-194, S-195, S-197, S-198, S-199 and S-200.

On August 19, 2019, a full public hearing commenced before a duly authorized Administrative Law Judge ("ALJ") of the Commission at its offices in Phoenix, Arizona. The Division and the ULG Respondents were represented by counsel. Respondent Ms. Plant appeared on her own behalf. No appearances were made by Respondents PAC, FPD, the Woodards, and Mr. Corbett. On the record, the ALJ considered and denied Ms. Plant's Motion for Continuance. Additional days of hearing were held on August 20, 21, 22, 26, and 27, 2019. At the conclusion of the hearing, a schedule for the filing of post-hearing briefs was established whereby the Division would file an initial brief by October 22, 2019, the Respondents would file a response by December 2, 2019, and the Division would file a reply by December 30, 2019.

Also on August 19, 2019, Ms. Plant filed a Reply to the Division's Response to Michelle Plant's Motion for Continuance.

On the same date, Ms. Plant filed a Motion to Exclude the Division's Exhibits S-194, S-195, S-197, S-198, S-199 and S-200.

On August 20, 2019, Ms. Plant filed 65 pages of proposed exhibits.

On August 21, 2019, the Division filed a Response to Motions to Exclude the Division's Exhibits S-194, S-195, S-197, S-198, S-199 and S-200.

On the same date, On August 21, 2019, the Division filed a Notice of Errata Regarding its Response to Motions to Exclude the Division's Exhibits S-194, S-195, S-197, S-198, S-199 and S-200.

On August 23, 2019, Ms. Plant filed a Reply to the Division's Response to Motions to Exclude Exhibits S-194, S-195, S-197, S-198, S-199 and S-200.

On August 26, 2019, the ULG Respondents filed a Reply in Support of Motion to Exclude the Division's Exhibits S-194, S-195, S-197, S-198, S-199 and S-200.

On October 22, 2019, the Division filed its Post-Hearing Brief.

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On November 7, 2019, Respondents ULG and Candy Kern-Fuller filed a Motion for an Extension of Time to File Response Brief until January 6, 2020. The ULG Respondents contended good cause for an extension exists "because of conflicts that have arisen in [their] counsels' schedules and to account for the shortened months of November and December due to the upcoming holiday season."

On November 11, 2019, Respondent Michelle Plant filed a Motion for Extension of Time to File Response Brief. Ms. Plant argued that good cause for an extension exists "because of conflicts that have arisen in [her] schedule and to account for the shortened months of November and December due to the upcoming holiday season."

Also on November 11, 2019, Respondent Michelle Plant filed an Amended Notice of Service Sheet for Motion for an Extension of Time to File Response Brief.

On November 14, 2019, Respondents ULG and Candy Kern-Fuller filed a Motion for Expedited Ruling.

On November 15, 2019, the Division filed a Response to Motion for Expedited Ruling. The Division stated that it did not oppose a reasonable extension for Ms. Plant and the ULG Respondents to file their response briefs, but "the proposed five (5) week extension … is unwarranted and inappropriate for the reasons the Division will explain in the Response it will file on November 18, 2019."

On the same date, by Procedural Order, extensions were granted to the filing date for Response Briefs by Ms. Plant and the ULG Respondents, with the December 2, 2019 deadline for filing Response Briefs continued to a date to be determined following further responses and replies by the parties.

On November 18, 2019, the Division filed a Response to Motion for an Extension of Time to File Response Briefs. The Division contended that the Ms. Plant and the ULG Respondents have failed to demonstrate good cause for an extension greater than two weeks.

On November 19, 2019, Respondent Michelle Plant filed an Amended Notice of Service Sheet for Motion for an Extension of Time to File Response Brief.

On November 25, 2019, Respondents ULG and Candy Kern-Fuller filed a Reply in Support of Motion for an Extension of Time to File Response Brief. The ULG Respondents contended that their

counsel had conflicts with the briefing schedule and that the Division had failed to demonstrate any adverse results from granting the requested extension.

On November 26, 2019, by Procedural Order, extensions were granted to the filing date for Response Briefs by Ms. Plant and the ULG Respondents. Ms. Plant and the ULG Respondents were ordered to file their Response Briefs on or before January 6, 2020. The Division was ordered to file its Reply Brief(s) on or before February 3, 2020.

On January 6, 2020, Respondent Ms. Plant filed Michelle Plant's, *Pro Se*, Post-Hearing Brief.

Also on January 6, 2020, Respondents ULG and Candy Kern-Fuller filed a Post-Hearing Response Brief.

On January 22, 2020, the Division filed a Motion for an Extension of Time to File Reply Brief. The Division requested an extension to March 6, 2020, due to the unexpected medical leave of the Division's lead attorney. The Division asserted that Respondents ULG and Candy Kern-Fuller have agreed with the extension and that the Division is awaiting a response from Ms. Plant after attempting to contact her.

On January 27, 2020, by Procedural Order, an extension was granted to the filing date for the Division's Reply Brief(s). The Division was ordered to file its Reply Brief(s) on or before March 6, 2020.

On March 5, 2020, the Division filed its Reply to Post-Hearing Brief of Respondent Michelle Plant.

Also on March 5, 2020, the Division filed its Reply to Post-Hearing Brief of Respondents Upstate Law Group and Candy Kern-Fuller.

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DISCUSSION

I. Brief Summary

This is an enforcement action brought against the Respondents for allegedly having made, participated in or induced offers and sales of securities in violation of the Arizona Securities Act. The allegations against the Respondents involve their respective roles in the sale of income stream investments, which were transactions wherein the investor (buyer) purchased future payments of a

veteran (seller). The veterans' payments came from either a pension, paid to the veteran by the Defense Finance Accounting Service ("DFAS"), or disability benefits, paid to the veteran by the Department of Veterans Affairs ("VA").

The Division alleges that income stream investments were offered between October 2013 and November 2015 through BAIC, Inc. ("BAIC") and SoBell Corp. ("SoBell"), with 53 investments being sold by William Andrew Smith and his company, Smith & Cox, LLC ("Smith & Cox"). The Division alleges that income stream investments were sold between March and May 2017 through PAC and FPD, with six investments being sold by Joseph DeSimone. The Division alleges registration and fraud violations against Respondents ULG and Ms. Kern-Fuller for having made, participated in or induced all 59 investments. The Division alleges registration and fraud violations against the remaining Respondents for having made, participated in or induced the six investments sold through PAC and FPD.

The Division alleges that Ms. Kern-Fuller and ULG provided legal and escrow services in connection with the investments. The Division alleges that Ms. Plant was the Vice President and Chief Operating Officer ("COO") of PAC. The Division alleges that Mr. Woodard was the Managing Partner of FPD. The Division alleges that Mr. Corbett solicited veterans to sell future payments from their pension or disability benefits for lump sum payments.

The Division alleges that the Respondents committed fraud in connection with the offer and sale of securities, in violation of A.R.S. § 44-1991(A), by making untrue statements or misleading omissions of material facts regarding: 1) Federal Anti-Assignment Acts that the Division contends may prohibit the income stream investments; 2) the role of ULG in the transactions; 3) prior cease and desist and consent orders from other states against Andrew Gamber, who was President of BAIC, incorporator of SoBell, and partial owner of PAC through another of his companies; and 4) an Internal Revenue Service ("IRS") tax lien against Mr. Smith, pertaining to the 53 income stream investments sold by him and Smith & Cox.

The Division requests that ULG and Ms. Kern-Fuller be ordered to pay restitution for the benefit of 21 investors in the 53 BAIC and SoBell investments in the amount of $2,572,247.37. The Division further requests that all Respondents be ordered to pay restitution for the benefit of four investors in

the six PAC and FPD investments in the amount of $371,191.23. The Division further requests the issuance of a cease and desist order and administrative penalties against the Respondents.

Ms. Plant and the ULG Respondents contend that the income stream investments are not securities. Alternatively, the ULG Respondents argue that the income stream investments are exempt from registration requirements. Ms. Plant and the ULG Respondents dispute the Division's fraud allegations and they assert that the income stream investments are not prohibited under the Federal Anti-Assignment Acts. The ULG Respondents argue that they are exempt from liability under the Securities Act because they acted in the ordinary course of their professional capacity. Ms. Plant argues that she was not a control person of PAC and should not be subject to liability for PAC's fraud violations.

II. Testimony

Carolyn Blythe Strong - Investor

Ms. Strong testified that she is a resident of Tucson, Arizona, and that she and her husband, Thomas Ralph Strong, (the "Strongs") invested $104,000 on March 17, 2015, while they resided in Tucson.[1] Ms. Strong testified that she has been a registered nurse for 45 years, that she has a doctorate in nursing, and that she has taught nursing for fifteen years at Arizona State University, University of Arizona, and Northern Arizona University.[2] Ms. Strong testified that her husband has a master's degree in chemical engineering and he worked in mining and clean energy systems before he attained a doctorate in biology and became a wildlife biologist.[3] Ms. Strong testified that her husband retired on January 13, 2015, but he has since returned to part-time work with the company from which he had retired.[4] Ms. Strong testified that she also retired on January 13, 2015, but she has had to take a part-time job, earning minimum wage, to help pay bills "because of our investments going down."[5]

Ms. Strong testified that she learned about Mr. Smith of Smith & Cox after she and her husband received a card in the mail from Smith & Cox inviting them to a dinner presentation on investments.[6]

[1] Tr. at 85.
[2] Tr. at 85-86, 148.
[3] Tr. at 86, 148.
[4] Tr. at 87.
[5] Tr. at 87.
[6] Tr. at 87-88.

Ms. Strong testified that she and her husband attended the presentation with 30 to 40 other people.[7] Ms. Strong testified that Messrs. Smith and Cox described their firm as being a fiduciary firm helping people with secure retirement investments.[8] Ms. Strong testified that she and her husband signed up for a follow-up appointment at the offices of Smith & Cox.[9] Ms. Strong testified that at this appointment, Messrs. Smith and Cox presented their investment strategy, and the Strongs discussed their desire to retire with long-term security of their principal while generating an income stream they could rely on, especially in the first five years.[10] Ms. Strong testified that the Strongs told Messrs. Smith and Cox that they were looking to invest someplace where they would not be charged high fees and commissions, and Smith & Cox touted the firm's 1.5% commission rate.[11] Ms. Strong testified that every investment has "a little bit of risk" and that the Strongs were looking for something more than a bank account or mutual funds to provide them with an investment stream.[12]

Ms. Strong testified that she received marketing materials from Smith & Cox.[13] The marketing materials stated that "[m]any of the firm's clients are military veterans" and that Mr. "Smith is widely recognized as an expert on veterans' benefits."[14] Ms. Strong testified that this information was significant to her as her father was a World War II veteran and she considered Smith & Cox's helping veterans to be a plus.[15] The marketing materials also touted Messrs. Smith and Cox as creating "balanced financial strategies to protect and grow clients' wealth" and the firm providing "[t]ax [s]mart [s]trategies for [a]ppreciated [a]ssets."[16] Ms. Strong testified that she was unaware Mr. Smith had an IRS tax lien recorded against him in 2013 for unpaid taxes, and had she known, that information would have been a concern for her, it would have undermined his credibility, and she would not have invested.[17] Ms. Strong testified that she and her husband also were unaware of the existence of a $93,000 judgment against Mr. Smith in Indiana from unregistered sales of securities to a client in that

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[7] Tr. at 88.
[8] Tr. at 88.
[9] Tr. at 88.
[10] Tr. at 90-91.
[11] Tr. at 91-92, 110.
[12] Tr. at 92-93.
[13] Tr. at 93-95
[14] Tr. at 95; Exh. S-145 at ACC006537.
[15] Tr. at 95-96.
[16] Tr. at 95, 98; Exh. S-145 at ACC006537.
[17] Tr. at 98, 110-111, 128.

state.[18]

Ms. Strong testified that the Strongs invested a total of approximately $440,000 with Smith & Cox that was divided into three investment "buckets": one for retirement years one through five, a second for years six through ten, and a third for years eleven and beyond.[19] Ms. Strong testified that the $440,000 the Strongs invested with Smith & Cox was the entirety of their retirement savings that they had been saving for approximately thirty years.[20] Ms. Strong testified that she and her husband each invested $51,999.96 in the first bucket investment.[21] Ms. Strong testified that the Strongs understood the first bucket investment as being loans to veterans that would be secured by the veterans' pension funds.[22] Ms. Strong testified that the Strongs did not realize the investment involved "one-on-one" loans, but rather they thought their investment would be placed in a pool to help many veterans.[23] Ms. Strong testified that the Strongs thought the investment would be good because it was secured by the veterans' pensions and because they were informed PAC would act as an insurance company guaranteeing to cover any missing funds.[24] Ms. Strong testified that she did not receive any information about PAC's corporate assets, ownership or management.[25] Ms. Strong testified that the Strongs saw the name BAIC on the header of their investment sales agreements, but they received no information about the owners, principals, or officers of BAIC.[26] Ms. Strong testified that the Strongs expected to receive a 5 percent interest return over sixty months on the roughly $104,000 they invested in the first bucket investment.[27] Ms. Strong testified that the Strongs did not perform any management or services, relying on others to receive the return on their investment.[28] Ms. Strong testified that the Strongs relied quite heavily upon Smith & Cox as they had not invested in anything like this before.[29] Ms. Strong testified that she understood ULG acted as an escrow company collecting funds and distributing them

[18] Tr. at 111.
[19] Tr. at 99-101; Exh. S-174.
[20] Tr. at 102-103.
[21] Tr. at 100.
[22] Tr. at 101-102.
[23] Tr. at 102, 109-110.
[24] Tr. at 103-106; Exh. S-138 at ACC006522.
[25] Tr. at 106.
[26] Tr. at 106-107; Exhs. S-116, S-117.
[27] Tr. at 107.
[28] Tr. at 107-108.
[29] Tr. at 108-109, 150.

to Provident, from who the Strongs received funds.[30] Ms. Strong testified that the Strongs did not have any direct contact with ULG, though they counted on ULG to process payments and send them to Provident.[31] Ms. Strong testified that she received documents about the investment transactions only from Smith & Cox.[32]

Ms. Strong testified that Messrs. Smith and Cox were aware that the Strongs were looking for a relatively low-risk investment.[33] Ms. Strong testified that no one told the Strongs about the risk that veterans could redirect payments away from ULG.[34] Ms. Strong testified that no one told the Strongs about the risk that federal law might prohibit the transactions with the veterans.[35]

Pursuant to the purchase agreement Ms. Strong signed, for $51,999 she purchased into a veteran's VA disability account from which she was to receive a monthly payment of $978.66 for 60 months from May 15, 2015 through April 15, 2020.[36] Ms. Strong testified that Mr. Smith presented the purchase agreement to the Strongs, but they were not shown or given a copy of that portion of the contract involving the individual veteran, whom the Strongs were unaware of as they thought they were putting money into a pool rather than paying for a specific person.[37] Ms. Strong testified that how the investment worked was confusing and Mr. Smith "went very quickly through" explaining the contract documents.[38] Pursuant to the terms of a Purchase Assistance Agreement, the purchase price was to be paid to ULG.[39] The investment documents also included a Disclosure of Risks statement that Ms. Strong initialed and signed.[40] Ms. Strong testified that she initialed and signed the Disclosure of Risks because she was counting on Mr. Smith to look through all the risks and give the Strongs good advice to provide an income stream while keeping their principal secure.[41] Ms. Strong testified that she did not do any investigation of her own into the investment transaction before signing the documents.[42]

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[30] Tr. at 109.
[31] Tr. at 109.
[32] Tr. at 135, 143.
[33] Tr. at 109.
[34] Tr. at 109.
[35] Tr. at 110, 154.
[36] Tr. at 112-114; Exh. S-116 at ACC001483, ACC001487, ACC001499.
[37] Tr. at 114-116.
[38] Tr. at 115-116.
[39] Tr. at 116; Exh. S-116 at ACC001506.
[40] Tr. at 116-117; Exh. S-116 at ACC001511-ACC001513.
[41] Tr. at 117, 139.
[42] Tr. at 139.

Ms. Strong testified that she did a Google search of Mr. Smith before investing, but she did not discover the tax lien and only later learned that his first name is William.[43]

The purchase documents also included an Option to Purchase Source Defaulted Structured Asset Agreement that was signed for PAC by Michelle Plant as Vice President.[44] Ms. Strong testified that she did not know who Ms. Plant was nor did she know anything about Ms. Plant's business background.[45] Ms. Strong testified that she did not receive a copy of her investment transaction documents, described as a closing book, from Smith & Cox.[46] Ms. Strong testified that the Strongs were only presented with the documents they were supposed to sign, after which they were given copies of the Contract for Sale of Payments and the Purchase Assistance Agreement.[47] Ms. Strong acknowledged that the Contract for Sale of Payments included an Acknowledgement of Risk stating that the "Seller shall retain at all times complete control over the payments and the underlying asset described herein."[48] Ms. Strong testified that no one at Smith & Cox discussed that provision with her.[49] Ms. Strong acknowledged that a Disclosure of Risks Statement included the statement that "[b]y law the Seller must maintain control over the pension itself at all times throughout this purchase and the performance of this contract."[50] Ms. Strong testified that she did not recall reading this particular section and that Smith & Cox never discussed that the seller maintained control over the pension at all times.[51]

Mr. Strong's $51,999 investment was also supposed to pay $978.66 per month for 60 months from May 15, 2015 through April 15, 2020.[52] Likewise, per the Purchase Assistance Agreement, the investment moneys were to be paid to ULG.[53] Ms. Strong testified that the Strongs did not receive the credit report for the veteran involved in Mr. Strong's investment, which showed that the veteran had a

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[43] Tr. at 148-149.
[44] Tr. at 117-118; Exh. S-116 at ACC001530-ACC001533.
[45] Tr. at 118.
[46] Tr. at 137, 142; S-116.
[47] Tr. at 149, 152-153; Exh. S-116 at ACC001495-ACC001499, ACC001506-ACC001510.
[48] Tr. at 140; Exh. S-116 at ACC001491.
[49] Tr. at 140.
[50] Tr. at 141; Exh. S-116 at ACC001511.
[51] Tr. at 141.
[52] Tr. at 118-119; Exh. S-144 at ACC006554.
[53] Tr. at 119-120; Exh. S-144 at ACC006573.

poor credit rating according to the credit agencies Experian, Equifax, and TransUnion.[54] Once again, the purchase documents included an Option to Purchase Source Defaulted Structured Asset Agreement that was signed for PAC by Michelle Plant as Vice President.[55] Ms. Strong testified that she did not recall whether Smith & Cox described the transactions as loans, but she understood that the investment funds would be in a pool from which veterans could borrow and that the investment was secured by the veterans' pensions.[56]

An accounting of Mr. Strong's $51,999 investment revealed that $12,314.56 was paid to the veteran who received funds pursuant to the transaction.[57] The accounting also revealed that moneys from Mr. Strong's $51,999 investment were also distributed to SMI, Barry Engolio, Smith & Cox, Darren Bodenhamer, Mark Corbett, Aydin Hamoudi, Donnie Faulkner, and ULG.[58] Ms. Strong testified that she did not know Barry Engolio, Darren Bodenhamer, Mark Corbett, Aydin Hamoudi, or Donnie Faulkner. Smith & Cox received $2,600, representing a 5% commission on Mr. Strong's investment.[59] Ms. Strong testified that they were not told Smith & Cox would receive a 5% commission on Mr. Strong's investment.[60] Ms. Strong testified that she understood ULG's role was to accept funds from the seller to be redistributed to the Strongs as buyers.[61] Ms. Strong testified that she did not know ULG would receive payment from investment principal and she did not authorize such payment.[62] On cross-examination, Ms. Strong testified that she thought ULG was basically acting as an escrow agent in the investment transactions, and she did not recall whether she had ever signed an escrow document authorizing ULG to charge a fee for providing services.[63]

Ms. Strong testified that she was not informed before she invested that federal laws prohibit or might prohibit the sale or assignment of veterans' pension and disability payments.[64] Ms. Strong testified that she was never informed that transactions involving the sale or assignment of veterans'

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[54] Tr. at 121-123; Exh. S-117 at ACC005349-ACC005351.
[55] Tr. at 122; Exh. S-117 at ACC005355.
[56] Tr. at 142, 145.
[57] Tr. at 123; Exh. S-117 at ACC005361.
[58] Tr. at 123-125; Exh. S-117 at ACC005361.
[59] Tr. at 124; Exh. S-117 at ACC005361.
[60] Tr. at 125.
[61] Tr. at 125-126.
[62] Tr. at 126.
[63] Tr. at 136-137.
[64] Tr. at 126.

pension and disability payments have been held unenforceable by several federal courts.[65] Ms. Strong testified that she was never informed that she and her husband would have no enforceable rights from the transaction.[66]

Ms. Strong testified that before she invested in March of 2015, she did not know that Andrew Gamber was a principal of BAIC, the company named on the transaction documents, or that Mr. Gamber was the subject of cease and desist orders in six different states for securities violations, including securities fraud.[67] Ms. Strong testified that she did not know that Ms. Plant had worked with Mr. Gamber at one of his companies that had been the subject of the cease and desist orders.[68] Ms. Strong testified that had she known about the cease and desist orders, that information would have affected the Strongs' decision to invest as they wanted a secure investment and would not have been comfortable with people "implicated in less than legal activities."[69]

Ms. Strong testified that since she and her husband invested, they received sporadic payments from 2015 through 2017, with Ms. Strong not receiving anything after October 2017 and Mr. Strong last getting some payments in 2018.[70] Ms. Strong testified that the lack of a predictable income stream from the investments has caused the Strongs difficulty in paying their bills, curtailed their ability to take vacations, and forced them to return to work part-time after they had retired.[71] Ms. Strong testified that her husband wanted to call ULG and PAC about the missed payments, but Mr. Smith instructed Mr. Strong not to call as Mr. Smith would look into the matter.[72] Ms. Strong testified that Mr. Smith never provided proof of having contacted ULG or PAC.[73] Ms. Strong testified that she never had conversations with Ms. Kern-Fuller or anyone at ULG.[74]

Ms. Strong testified that prior to working with Smith & Cox, she had worked with other investment advisors. Ms. Strong testified that the Strongs' prior investments included mutual funds,

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[65] Tr. at 126-127.
[66] Tr. at 110, 127, 1654.
[67] Tr. at 127.
[68] Tr. at 127.
[69] Tr. at 127-128.
[70] Tr. at 128.
[71] Tr. at 128-129.
[72] Tr. at 130-131, 142, 150-151.
[73] Tr. at 152.
[74] Tr. at 134-135.

but they had no real estate investments other than their home and that she did not know if they had any bonds.[75]

Ms. Strong testified that she has never spoken with Ms. Plant nor had she spoken with anyone from PAC prior to her investment.[76] Ms. Strong testified that she had no knowledge whether Ms. Plant or PAC were aware of Mr. Smith's tax lien prior to the Commission bringing this case.[77]

Ms. Strong testified that she accepted that there is some risk to any investment, but she believed the transactions would be secure based on the way they were presented.[78]

Ms. Strong testified that at the time of the Strongs' investment, they had a combined net worth under $1 million and an annual income under $300,000.[79]

Ms. Strong testified that she and her husband "are very naïve investors" and, while they both have doctorate degrees, their education "has nothing to do with finance."[80]

Dean Hebb - Investor

Mr. Hebb testified that he is a married resident of Green Valley, Arizona, who invested $125,000 on April 30, 2015, while living in Green Valley.[81] Mr. Hebb testified that he has been retired since February 2015, having previously worked primarily in sales and plastic packaging, where he was a vice president in multiple companies, and he also had a bottled water company at one time.[82] Mr. Hebb testified that he has a bachelor's of science degree in industrial engineering. Mr. Hebb testified that his wife, Kathleen Ledesma, retired in 2018 after having been in charge of foster adoptions at a government financed agency.[83]

Mr. Hebb testified that he and his wife met Messrs. Smith and Cox at a luncheon in March 2015, after having seen a flyer about their services.[84] Mr. Hebb testified that he received a flyer at the March 2015 luncheon that described Mr. Smith as an expert on veterans benefits and Smith & Cox as

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[75] Tr. at 136.
[76] Tr. at 144.
[77] Tr. at 148.
[78] Tr. at 142-143.
[79] Tr. at 103.
[80] Tr. at 98.
[81] Tr. at 158.
[82] Tr. at 158-159, 210.
[83] Tr. at 158-159.
[84] Tr. at 159.

providing tax smart strategies.[85] Mr. Hebb testified that had he known the IRS recorded a $125,000 tax lien against Mr. Smith two years before for unpaid taxes, Mr. Hebb would have found this information very important and he would not have invested with Smith & Cox.[86] Mr. Hebb testified that two to three weeks after the luncheon, he and his wife met with Messrs. Smith and Cox at the Smith & Cox office.[87] Mr. Hebb testified that at the meeting, he discussed his investing objectives, namely that he was looking for a safe investment that would return about five percent annually and that he had a low tolerance for risk.[88] On cross examination, Mr. Hebb agreed that there is no such thing as a guaranteed risk-free five percent investment.[89] Mr. Hebb testified that Messrs. Smith and Cox discussed with him an investment plan that would place his funds in three buckets, with one to provide annual returns for the first five years, a second to provide annual returns for the next five years, and the third to return the original investment ten years out.[90] Mr. Hebb testified that Smith & Cox presented an investment strategy involving a $500,0000 investment with $125,000 going into the first bucket, which was to be a secured account that was used to buy pensions that would return $2,358 per month.[91] Mr. Hebb testified that this first bucket was described as "probably the safest investment you can make" as a law firm was vetting the people in the transaction, insurance companies were involved, and there were "several backups" if a seller defaulted.[92] Mr. Hebb testified that this first bucket was further described as containing structured income assets, which would provide a secured cash flow from government pensions for military or civil service, or the seller's corporate retirement income.[93] On cross examination, Mr. Hebb testified that he was not sure where he heard the term "buying pensions," but that was his understanding of what was being done.[94] Mr. Hebb testified that he made the investment looking to make a return that would pay better than a certificate of deposit from a bank.[95] Mr. Hebb testified that he did not have to do anything other than make an investment to get the return,

[85] Tr. at 161-162; Exh. S-169 at ACC016000.
[86] Tr. at 162.
[87] Tr. at 162-163.
[88] Tr. at 164, 189.
[89] Tr. at 193.
[90] Tr. at 164-166; Exh. S-169 at ACC016002.
[91] Tr. at 166; Exh. S-169 at ACC016002.
[92] Tr. at 167, 189, 203.
[93] Tr. at 169-170; Exh. S-169 at ACC016002, ACC016004.
[94] Tr. at 198.
[95] Tr. at 170.

and he had no control over whether the investment actually paid out.[96]

The documentation from Smith & Cox further stated that the buyer's attorney, ULG, would prepare and file a UCC-1 against the seller's cash flow to create a first position secured creditor status on the structured income asset.[97] Mr. Hebb testified that this information had an impact on him as he felt the presence of a law group indicated that the investment had been vetted.[98] The documentation from Smith & Cox further stated that ULG had been "contracted by SMI to provide legal, escrow and payment services for the exclusive benefit of the Buyer and SMI."[99] Mr. Hebb testified that he did not know who SMI was, but he understood that ULG would be his lawyer in the transaction.[100] The documentation from Smith & Cox also stated that "ULG ensures all documentation is complete and the purchased payments are directed to ULG's Trust Account prior to closing."[101] Mr. Hebb testified that this information was important to him because it signified that the transaction was legal.[102] Another page in the documents from Smith & Cox discussed default protection provided by PAC.[103] Mr. Hebb testified that he understood that if the seller defaulted, PAC would make the payments instead of the seller.[104] Mr. Hebb testified that he did not know anything about PAC or who were the principals of the company.[105]

Mr. Hebb testified that no one discussed with him the risk that federal law might prohibit the transactions.[106] Mr. Hebb testified that no one discussed with him that the seller could redirect payments away from ULG so that Mr. Hebb would not get paid on the investment.[107]

Mr. Hebb testified that at the time of his investment, he and his wife had a combined net worth under $1 million and an annual income under $300,000.[108] Mr. Hebb and his wife made two

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[96] Tr. at 170-171.
[97] Exh. S-169 at ACC016004.
[98] Tr. at 171.
[99] Exh. S-169 at ACC016006.
[100] Tr. at 172, 215-216.
[101] Exh. S-169 at ACC016006.
[102] Tr. at 172-173.
[103] Exh. S-169 at ACC016007.
[104] Tr. at 173-174, 199.
[105] Tr. at 174.
[106] Tr. at 174.
[107] Tr. at 174-175.
[108] Tr. at 175.

investments on April 30, 2015.[109]

Mr. Hebb testified that he received a purchase application from Mr. Smith for a 60-month payment period beginning July 15, 2015, for a monthly payment of $1,802.55 from a seller's VA disability payment, at a purchase price of $95,776.40.[110] The contract for the sale of payments from this transaction contained a section on Acknowledgment of Risk that stated the "Seller shall retain at all times complete control over the payments and the underlying asset described herein."[111] Mr. Hebb testified that he did not go over the risks section before he signed and initialed the contract.[112] Mr. Hebb testified that his understanding was that ULG acted as an escrow and controlled the money, but he never asked for clarification from ULG about how the payments and processing would work or the extent to which the seller retained control over payments.[113] Mr. Hebb testified that Messrs. Smith and Cox went over risks of the investment in their discussions (or so Mr. Hebb thought); that he trusted Messrs. Smith and Cox; and that he relied on their advice.[114] The Purchase Assistance Agreement stated that the purchase price was to be paid to ULG.[115] Mr. Hebb testified that he gave his investment money to Mr. Smith who sent it to ULG.[116] The transaction contained an Option to Purchase Source Defaulted Structured Asset Agreement with PAC that was signed by Michelle Plant as Vice President of PAC.[117] Mr. Hebb testified that he understood Life Funding Options ("LFO") bought PAC's position.[118] Mr. Hebb testified that he knew nothing about Ms. Plant's business background or her prior employers.[119] Mr. Hebb testified that Smith & Cox did not say anything about the principals behind PAC.[120] Mr. Hebb testified that he did not speak with Ms. Plant or anyone at PAC prior to making his investments.[121]

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[109] Tr. at 185; Exhs. S-119 at ACC000462, S-120 at ACC000514.
[110] Tr. at 176-177; Exh. S-119 at ACC000443.
[111] Tr. at 177-178, 193-195; Exh. S-119 at ACC000446-ACC000455.
[112] Tr. at 178, 193.
[113] Tr. at 194-195.
[114] Tr. at 178-179, 201.
[115] Tr. at 179; Exh. S-119 at ACC000462.
[116] Tr. at 179.
[117] Tr. at 180; Exh. S-119 at ACC000484-ACC000487.
[118] Tr. at 173, 186.
[119] Tr. at 180.
[120] Tr. at 181.
[121] Tr. at 200-201.

Mr. Hebb acknowledged that a Disclosure of Risks Statement included the statement that "[b]y law the Seller must maintain control over the pension itself at all times throughout this purchase and the performance of this contract."[122] Mr. Hebb testified that he never discussed this particular provision with Smith & Cox, and that Mr. Smith described the Disclosure of Risks Statement as boilerplate that needed to be signed to complete the transaction.[123] Mr. Hebb acknowledged that the Disclosure of Risks Statement also stated that "While efforts have been undertaken to minimize the risk to buyer(s), buyer(s) understand that unknown and other unidentified risks exist and persist and this is not a guaranteed product."[124] Mr. Hebb acknowledged that the Purchase Assistance Agreement contained the following statement: "Buyer and Buyer's agent/advisor(s) desire, acknowledge, and agree that in connection with Buyer's purchase of the Payments, SoBell Corp, Buyer's agent's distributor, and other professionals engaged by Buyer's agent(s) shall provide to Buyer only administrative assistance, and that all legal or financial advice or assistance is being solely provided by the Buyer's agent/advisor as detailed in the Purchaser Suitability Form," though Mr. Hebb testified that he did not recall reading this information.[125]

Mr. Hebb testified that he made a second investment for a 60-month payment period, beginning July 15, 2015, paying $550 monthly from a seller's VA disability payment, at a purchase price of $29,233.61.[126]

Mr. Hebb testified that while documents for his transactions were contained in SoBell closing books, he did not know what SoBell was, nor did he know who the principals of SoBell were.[127] Mr. Hebb testified that Smith & Cox did not say anything about the principals behind SoBell.[128]

Mr. Hebb testified that before he invested he did not directly ask what fees Smith & Cox would charge for the investment, but he did not care what anyone else made as long as he received his monthly payment.[129] Mr. Hebb testified that before he invested no one told him that federal law might prohibit

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[122] Tr. at 195-196; Exh. S-119 at ACC000467.
[123] Tr. at 195-196.
[124] Tr. at 202-203; Exh. S-119 at ACC000470, underscore in original.
[125] Tr. at 203-204; Exh. S-119 at ACC000464.
[126] Tr. at 180-181; Exh. S-120 at ACC000495.
[127] Tr. at 175.
[128] Tr. at 181.
[129] Tr. at 182.

these transactions or that federal courts had ruled them to be unenforceable.[130]

Mr. Hebb testified that he would not have invested had he known at the time that the principal of SoBell, Mr. Gamber, had eight orders from other states for securities violations including fraud.[131] Mr. Hebb testified that he would not have invested had he known at the time that Michelle Plant had worked for Mr. Gamber at Mr. Gamber's prior company that had eight cease and desist orders against it.[132] Mr. Hebb testified that he would not have invested had he known that these investments were prohibited by federal law.[133]

Mr. Hebb testified that his investments paid fine for about 12 to 15 months when the payments stopped.[134] Mr. Hebb testified that he was not overly concerned at first because he believed the investment had "backup," but he kept getting false promises from Mr. Smith that payments would be coming.[135] Mr. Hebb testified that out of his $125,000 investment, he has lost approximately $102,144.[136] Mr. Hebb testified that the loss of funds has affected his and his wife's retirement as they have had to cut back on expenses and she has had to take some consulting jobs.[137]

Mr. Hebb testified that he neither spoke with anyone at, nor had a retainer agreement with, ULG.[138] Mr. Hebb testified that he relied on the information from Smith & Cox about the involvement of PAC, LFO, and ULG in the transactions.[139] Mr. Hebb testified that he received documents about the investment only from Smith & Cox.[140] Mr. Hebb testified that he did not do any due diligence of his own outside of his reliance upon Smith & Cox.[141] Mr. Hebb testified that if he did any research on Smith & Cox before investing, he would only have looked up their name on the internet.[142]

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[130] Tr. at 182.
[131] Tr. at 182-183.
[132] Tr. at 182-183.
[133] Tr. at 218.
[134] Tr. at 183.
[135] Tr. at 183-184, 199.
[136] Tr. at 186.
[137] Tr. at 186.
[138] Tr. at 174, 188.
[139] Tr. at 189-190.
[140] Tr. at 204.
[141] Tr. at 190-191.
[142] Tr. at 201.

Mr. Hebb testified that he is familiar with investments such as stocks, bonds, and annuities.[143] Mr. Hebb testified that he and his wife both had IRAs, but he did not do much research in those.[144]

Susan Hill - Investor

Ms. Hill testified that she is a married resident of Marana, Arizona, who invested $105,000 in October and November of 2014, while living in Marana.[145] Ms. Hill testified that she worked in different areas of human resources for different companies, primarily doing training in human resources information systems, before she retired in 2001, after which time she was licensed and "dabbl[ed]" briefly in real estate.[146] Ms. Hill testified that her husband, Marshall Hill, worked as a salesman and office manager for companies in the business forms industry, then became a vice president of sales and marketing for a firm providing arbitration and mediation services, before becoming a pool designer until his retirement in 2010.[147]

Ms. Hill testified that she received a flyer about a luncheon investment seminar hosted by Smith & Cox, which interested her as she and her husband were looking for guidance and professional help to manage their investments.[148] Ms. Hill testified that she and her husband (the "Hills") are both "very unsophisticated investors," although her husband opened a Vanguard account with her 401(k) funds that he "did quite all right" managing for about a year.[149] Ms. Hill testified that at the luncheon, Messrs. Smith and Cox discussed their experience and gave an overview of their investment vehicles, from which the Hills considered Messrs. Smith and Cox to be very personable, honest, and professional.[150] After the luncheon, the Hills went to a follow-up meeting at the offices of Smith & Cox to discuss their investment needs.[151] At the meeting, Ms. Hill testified that she was primarily concerned about losing or suffering a big reduction to her investment funds.[152] Ms. Hill testified that Smith & Cox presented her with an investment strategy that would divide her funds in three buckets: the first bucket providing

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[143] Tr. at 192.
[144] Tr. at 197, 216.
[145] Tr. at 223-225.
[146] Tr. at 223-224.
[147] Tr. at 223-225.
[148] Tr. at 225-226.
[149] Tr. at 225-226, 252, 260.
[150] Tr. at 226-227.
[151] Tr. at 227-228.
[152] Tr. at 228.

a monthly income for the five years, the second bucket providing a monthly income for years 6 to 10, and the third returning the initial investment amount in year 11.[153] Ms. Hill testified that the investment strategy appealed to the Hills as it looked simple, safe, and lucrative.[154] Ms. Hill testified that she signed a client service agreement with Smith & Cox on July 23, 2014.[155]

The first bucket of the investment strategy entailed a $106,000 investment into a "DPIS Secured Account," though Ms. Hill testified she did not know what that meant.[156] Ms. Hill testified that her understanding of bucket 1, from Mr. Smith's description, involved buying something from the Liberty Trust Company which would produce a return of about 5 percent per year and provide a monthly income stream of $2,000 for five years once she chose to activate it.[157]

Ms. Hill testified that at the time of her investment, she and her husband had a combined net worth under $1 million and an annual income under $300,000.[158]

Ms. Hill testified that while documents for her investment were contained in a BAIC closing book, she did not know what BAIC was, nor did she know anything about the people managing BAIC at the time of her investment.[159]

Under the terms of Ms. Hill's purchase application, she was to receive a monthly payment of $1,125.91 for five years at a purchase price of $59,823.92.[160] Ms. Hill also initialed pages on a contract for the sale of payments that provided she would receive a monthly payment of $1,125.91 for 60 months from December 2014 through November 2019.[161] The contract for sale of payments included a section titled Acknowledgement of Risk which Ms. Hill testified she had not read and neither Mr. Smith nor Mr. Cox explained.[162] Ms. Hill testified that Messrs. Smith and Cox did not say anything about the safety of the investment, but they knew she was interested in a conservative, safe investment.[163] Ms. Hill testified that she received a call from Smith & Cox asking her to come in to sign some documents,

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[153] Tr. at 229-230; Exh. S-139 at ACC006423.
[154] Tr. at 230.
[155] Tr. at 231; Exh. S-139 at ACC006424-ACC006425.
[156] Tr. at 231; Exh. S-139 at ACC006423.
[157] Tr. at 232-233, 257.
[158] Tr. at 233.
[159] Tr. at 234.
[160] Tr. at 234; Exh. S-108 at ACC005086.
[161] Tr. at 234-235; Exh. S-108 at ACC005094.
[162] Tr. at 235-236; Exh. S-108 at ACC005095-ACC005096.
[163] Tr. at 236, 252-253.

which she did.[164] Ms. Hill testified that she did not read the documents and they were not explained to her, but she trusted Mr. Smith.[165] Ms. Hill testified that she never received a copy of the closing book and she was not given copies of the documents she signed, even though Mr. Smith said they would provide her copies.[166] Ms. Hill testified that all of the information she received and on which she relied to participate in these transactions came from Smith & Cox.[167] Ms. Hill testified that she did not do any due diligence regarding the investment and relied upon Smith & Cox.[168] Ms. Hill acknowledged that the Contract for Sale of Payments included an Acknowledgement of Risk stating that the "Seller shall retain at all times complete control over the payments and the underlying asset described herein," though she testified that she did not read this provision and it was not discussed with her at Smith & Cox.[169] Ms. Hill acknowledged that a Disclosure of Risks Statement included the statement that "[b]y law the Seller must maintain control over the pension itself at all times throughout this purchase and the performance of this contract."[170] Ms. Hill testified that she did not discuss this provision with Smith & Cox and that she did not know the source of the income streams for the transactions.[171] Ms. Hill testified that she was unaware that she had a three-day right of rescission to cancel her transaction and that it was not disclosed by Smith & Cox.[172] Ms. Hill testified that she did not really understand the transaction prior to entering into it and that she relied on Smith & Cox to explain it.[173]

Pursuant to the terms of a Purchase Assistance Agreement, the purchase price for the investment was to be paid to ULG.[174]

Ms. Hill testified to investing in a second transaction with a purchase application for a $45,376.30 purchase price to pay $854 per month.[175] Ms. Hill testified that she signed and initialed the contract for sale of payments for this investment.[176] As in the first investment, the purchase price for

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[164] Tr. at 237, 254.
[165] Tr. at 237-238.
[166] Tr. at 238, 263.
[167] Tr. at 250.
[168] Tr. at 253, 260.
[169] Tr. at 253-254; Exh. S-109 at ACC005205.
[170] Tr. at 256; Exh. S-109 at ACC005223.
[171] Tr. at 256.
[172] Tr. at 257-258; Exh. S-109 at ACC005269.
[173] Tr. at 258.
[174] Tr. at 239; Exh. S-108 at ACC005107.
[175] Tr. at 239-240; Exh. S-109 at ACC005195.
[176] Tr. at 240; Exh. S-109 at ACC005204-ACC005209.

this investment was to be paid to ULG.[177] Ms. Hill testified that ULG was not mentioned by Smith & Cox when she made her investment and she did not hear about them until 2017 when Mr. Smith identified ULG as the account rep.[178]

Ms. Hill testified that she paid for the two investments with a $106,000 check to the Liberty Trust Company.[179] Ms. Hill testified that the $106,000 was a portion of the $436,000 she had saved in a 401(k) over thirty years.[180]

Ms. Hill testified that she activated bucket 1 of her investment package to begin paying in January 2017.[181] Ms. Hill testified that she received $2,000 per month from January 2017 until October 2018, when she raised the amount to $3,000 per month.[182] Ms. Hill testified that she raised the monthly payments because the Hills needed the money, because she believed that her money should have been growing since she delayed on drawing payments for a few years, and because she had learned about a Commission investigation.[183] Ms. Hill testified that she received monthly payments of $3,000 per month until May 2, 2019, when she received only $1,047.23.[184] Ms. Hill testified that she learned from Liberty Trust that the two veterans, to whom her investment provided loans, stopped making payments and that her $106,000 investment was gone.[185] Ms. Hill testified that she only received $64,047.23 from her $106,000 investment.[186] Ms. Hill testified that the loss of money from this investment has required her to start taking payments from buckets 2 and 3, which are paying her less than she was supposed to receive from bucket 1.[187]

Ms. Hill testified that before she invested no one told her that federal law might prohibit the sale of veterans' pension or disability payments, or that federal courts had ruled transactions of this nature to be unenforceable.[188] Ms. Hill testified that no one told her that BAIC's president had a prior

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[177] Tr. at 240; Exh. S-109 at ACC005218.
[178] Tr. at 264-265; Exhs. S-141 at ACC015631, S-142 at ACC015635.
[179] Tr. at 241; Exh. S-140.
[180] Tr. at 241.
[181] Tr. at 242.
[182] Tr. at 242.
[183] Tr. at 242.
[184] Tr. at 243.
[185] Tr. at 243-246.
[186] Tr. at 246, 250-251.
[187] Tr. at 248-249.
[188] Tr. at 247.

company against which eight cease and desist orders were issued in six states for violating securities laws.[189]

Ms. Hill testified that she had never met or spoken with Ms. Kern-Fuller.[190] Ms. Hill testified that she never spoke with Ms. Plant or anyone at PAC prior to making her investment.[191] Ms. Hill testified that she had no reason to believe Mr. Smith had ever spoken with Ms. Plant.[192] Ms. Hill testified that she never contacted ULG or PAC to try and collect against the defaulting veteran sellers in court.[193] Ms. Hill testified that she was not aware that some buyers had gotten judgments in court from sellers who defaulted.[194]

William Andrew Smith - Salesman

Mr. Smith testified that he has resided in Arizona for over twelve years and works as an investment advisor representative at his firm, Smith & Cox.[195] Mr. Smith testified that he has held a Series 65 securities license since 2009.[196] Mr. Smith testified that he previously worked as an insurance representative in Indiana.[197] Mr. Smith testified that he had an insurance disciplinary finding and a $93,000 judgment against him in Indiana in 2008 for the sale of a universal lease product that the regulator determined to be a security.[198] Mr. Smith testified that he and Mr. Cox sold insurance in Pima County from their own firm, Preferred Resource Group, before he expanded into securities.[199]

Mr. Smith testified that in his 2009 application for a securities industry license, he answered "No" to the question of whether he had unsatisfied judgments or liens against him, an incorrect answer at the time, though he did disclose the Indiana judgment later in the application without disclosing that it remained unpaid.[200] Mr. Smith testified that the investment advisor application form for Smith & Cox, filed January 29, 2009, failed to disclose the judgment against Mr. Smith.[201]

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[189] Tr. at 247.
[190] Tr. at 250.
[191] Tr. at 259-260.
[192] Tr. at 260.
[193] Tr. at 261.
[194] Tr. at 262.
[195] Tr. at 288, 293.
[196] Tr. at 289.
[197] Tr. at 290.
[198] Tr. at 290, 295-296; Exh. S-62 at ACC006268.
[199] Tr. at 291-292.
[200] Tr. at 294-296, 383-384; Exh. S-62 at ACC006263, ACC006268.
[201] Tr. at 296-297; Exh. S-61 at ACC006034, ACC006067.

Mr. Smith testified that in June 2013, the IRS recorded a $125,000 lien against him for unpaid taxes from 2007 and 2008.[202] Mr. Smith testified that this lien remains unpaid and he never disclosed it to investment advisory clients or to the Commission regarding his and his firm's licensing.[203] Mr. Smith testified that he never disclosed the lien to ULG, SMI, PAC, or his own clients.[204] Mr. Smith testified that Mr. Chrustawka knew about the Indiana judgment against Mr. Smith.[205] Mr. Smith testified that he never disclosed his Indiana judgment to his clients.[206]

Mr. Smith testified that in August or September 2013 he became aware of, and interested in potentially selling, military income stream investments.[207] Mr. Smith testified that a law firm, ULG, was involved in the product and the distributor was a company named SMI.[208] Mr. Smith testified that the investment involved his clients entering into an agreement to offer a sum of money in return for an income stream over a specific period of time.[209] Mr. Smith testified that he understood his clients invested in the product expecting a return, generally 5%.[210] Mr. Smith testified that the product was supposed to issue a return "that was steady and something we could count on."[211] Mr. Smith testified that he was told that ULG represented the buyers in the transactions, which would be Mr. Smith's investor clients.[212] When presented with a ULG legal services agreement stating that ULG represented only the distributor, which would have been SMI, "in these transactions and not the buyer, seller or any other entity," Mr. Smith testified that this was "news to me."[213]

Mr. Smith testified that in conducting due diligence of the product, he spoke with Brad Chrustawka and Katherine Snyder with SMI and PAC.[214] Mr. Smith testified that Smith & Cox's compliance consultant, Elliott Smith, also conducted due diligence regarding the product.[215] Mr. Smith

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[202] Tr. at 298, 299.
[203] Tr. at 299.
[204] Tr. at 353, 365, 383.
[205] Tr. at 365.
[206] Tr. at 384.
[207] Tr. at 299.
[208] Tr. at 300-301.
[209] Tr. at 301.
[210] Tr. at 301-302.
[211] Tr. at 302.
[212] Tr. at 303-304, 315.
[213] Tr. at 319-320; Exh. ULG-75 at 1 of 9 ¶ 1.
[214] Tr. at 302-303, 336-337.
[215] Tr. at 304-305; Exh. S-156.

testified that Elliott Smith emailed Smith & Cox with an SEC Investor Bulletin addressing Pension or Settlement Income Streams ("SEC Bulletin"), which Elliott Smith recommended be read carefully.[216] The SEC Bulletin warned that these income stream investments "can be risky and complex" and that "[f]ederal law may restrict or prohibit retirees from 'assigning' their pension to someone else."[217] Mr. Smith testified that he did some additional due diligence into the transactions and informed Elliott Smith that he was comfortable moving forward with the transactions.[218] Mr. Smith testified that he did not provide or disclose the SEC Bulletin to investors interested in the product.[219] Mr. Smith testified that at no time did Elliott Smith tell him that the transactions were illegal or constituted illegal securities.[220] Mr. Smith testified that at the time he conducted due diligence regarding the transactions, the cease and desist orders may not have been issued yet.[221] Mr. Smith testified that he did not seek the advice of legal counsel on whether he should proceed with the asset.[222] Mr. Smith testified that he did not speak with BAIC's counsel but he received sufficient information from Mr. Chrustawka and Mr. Bodenhamer to satisfy his concerns about BAIC.[223]

Mr. Smith testified that he relied upon Mr. Bodenhamer, Mr. Chrustawka, and Ms. Snyder before deciding to offer the product to his clients.[224] Mr. Smith testified that he did not recall speaking with anyone at ULG before deciding to sell these products, but the involvement of a reputable law firm in the transactions gave legitimacy to the lawfulness of the investment, comforted Mr. Smith, and was the linchpin in his decision that the product was an appropriate investment.[225] Mr. Smith testified that while he did not speak with anyone at ULG, Darren Bodenhamer with SMI and/or Mr. Chrustawka, told him that ULG gave assurances that these products were not securities.[226] When presented with a ULG legal services agreement stating that the firm "represents that no member of the firm or its' [sic]

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[216] Tr. at 305-306; Exh. S-157.
[217] Tr. at 306-307; Exh. S-157 at ACC006696-ACC006697.
[218] Tr. at 311-312; Exh. S-165.
[219] Tr. at 331, 384.
[220] Tr. at 349.
[221] Tr. at 385-386.
[222] Tr. at 368-369.
[223] Tr. at 369.
[224] Tr. at 349.
[225] Tr. at 314-315, 373-374, 386-387. Mr. Smith's opinion of ULG at the time came from finding favorable reviews and good bar standing for ULG after an internet search. Tr. at 372, 374.
[226] Tr. at 316-318, 320.

staff is competent to provide tax advice, or securities advise [sic] to you or your entity," Mr. Smith testified that this information would have changed his opinion whether he wanted to take the risk of selling these products.[227]

Mr. Smith testified that he began selling the income stream products in October 2013.[228] Mr. Smith testified that on February 10, 2014, Smith & Cox entered an Agent Agreement with SMI whereby Smith & Cox would promote and market products and services offered by SMI.[229] Mr. Smith testified that as an investment advisor, Smith & Cox owed a fiduciary duty to act in its clients' best interests.[230] Mr. Smith testified that he did not disclose to clients that Smith & Cox was the agent of the distributor.[231]

Mr. Smith testified that in 2014 he downloaded marketing materials for the structured income asset from SMI's website that he reviewed with and gave to his clients.[232] Mr. Smith testified that all the marketing materials he received for these transactions came from SMI and that he did not receive any materials from ULG for prospective investors.[233] The marketing materials identified ULG as having been contracted by SMI "to provide legal, escrow and payment services for the exclusive benefit of the Buyer and SMI."[234] On cross-examination, Mr. Smith testified that he understood ULG's representation of the buyer did not begin until closing and that it "makes sense" that ULG's representation of the distributor ended at closing.[235] On re-direct, Mr. Smith acknowledged that the marketing materials do not state when ULG's representation begins or ends, but suggest that ULG's representation of the buyer begins before closing by stating that ULG provides the buyer with a LexisNexis search report, a credit report, and a transaction summary for review prior to closing.[236] The marketing materials further stated that "ULG ensures all documentation is complete and the purchased payments are directed to ULG's Trust Account prior to closing," which Mr. Smith testified would be

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[227] Tr. at 320; Exh. ULG-75 at 2 of 9 ¶ 6.
[228] Tr. at 321.
[229] Tr. at 321-322; Exh. S-71.
[230] Tr. at 322-323.
[231] Tr. at 323.
[232] Tr. at 323-324, 331; Exhs. S-73, S-76.
[233] Tr. at 346, 353.
[234] Tr. at 325, 333; Exh. S-73 at ACC005816.
[235] Tr. at 351-352, 377.
[236] Tr. at 378; Exh. S-73 at ACC005816.

in the buyer's interest and suggested that ULG represented the buyer prior to closing.[237] Mr. Smith testified that this information about ULG ensuring documentation was important to him and that he expected the disclosures given to him for his clients were complete.[238] Mr. Smith testified that the marketing materials provided that ULG filed a UCC form to secure the investment.[239] The marketing materials also stated that ULG processed all monthly payments in ULG's trust accounts.[240] Mr. Smith testified that the client trust account was significant to him in recommending the product as it gave him comfort that ULG was watching and controlling the flow of funds.[241]

Mr. Smith testified that he understood PAC's role was to pick up monthly payments after a veteran seller missed three, which would give a 90-day window for ULG to contact the seller and remedy the situation through collection efforts.[242] Mr. Smith testified that he did not know Mr. Gamber was a part owner of PAC.[243] Mr. Smith testified that if the seller remained in default, PAC was to make payments for the remainder of the term.[244] Mr. Smith testified that while SMI's documents stated that PAC would only pay outstanding principal in monthly payments, he was assured by Mr. Chrustawka that PAC would make full payments to Smith & Cox's clients, which they did.[245] Mr. Smith testified that an SMI Executive Summary he gave to investors stated that there was a risk mitigation option against seller default pursuant to which buyers could purchase an option whereby PAC would buy the defaulted asset for the outstanding principal.[246] Mr. Smith testified that this purchase of the defaulting asset would be in the form of a corporate promissory note guaranteed by PAC and paid in equal monthly installments over the remaining term of the original contract for sale of payments.[247] Mr. Smith testified that the SMI Executive Summary also identified risk mitigation in the form of ULG ensuring the documentation for the transaction being accurate and complete with formal legal agreements and filings creating the buyer's entitlement to the structured income asset and the seller's obligation to

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[237] Tr. at 326, 333, 378-379; Exh. S-73 at ACC005816.
[238] Tr. at 326-327.
[239] Tr. at 325, 333-334; Exh. S-73 at ACC005816.
[240] Tr. at 327, 334; Exh. S-73 at ACC005816.
[241] Tr. at 334.
[242] Tr. at 327, 348.
[243] Tr at 331.
[244] Tr. at 328, 369, 370.
[245] Tr. at 370-371.
[246] Tr. at 328-329, 331; Exh. S-76 at ACC000330.
[247] Tr. at 330-331; Exh. S-76 at ACC000331.

pay.[248]

Mr. Smith testified that he understood that these investment products would generate a return for his clients without them having any control over how the investment worked out or them needing to do anything other than invest their money.[249] Mr. Smith testified that he told his clients that he vetted the investment and he understood his clients relied upon him to provide appropriate investments.[250]

Mr. Smith testified that he sold 53 investments, all to retired investors to whom he presented the investment as being a safe, reliable product to generate monthly income.[251] Mr. Smith testified that approximately 60% of the investments defaulted, starting in late 2014 or 2015.[252] Mr. Smith testified that he contacted Mr. Chrustawka, Ms. Snyder, and Mr. Bodenhamer with PAC once the defaults began and he was informed that after 90 days his clients could exercise the option for a promissory note so PAC could start making payments.[253] Mr. Smith testified that PAC began making payments, but soon PAC had trouble making payments due to the number of defaults, leading PAC to stop paying sometime in 2017 or 2018.[254]

Mr. Smith testified that after PAC stopped making payments he made contact with Ms. Kern-Fuller at ULG to inquire about the status of collections regarding some specific individuals.[255] Mr. Smith testified that Ms. Kern-Fuller required him to get a power of attorney from the investors before she would speak to him.[256] Mr. Smith testified that he understood Ms. Kern-Fuller wanted the power of attorney because she represented the investors.[257] Mr. Smith testified that he got powers of attorney for about 10 of his clients but he "never really got any response on any of my questions."[258]

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[248] Tr. at 329-330; Exh. S-76 at ACC000330.
[249] Tr. at 332.
[250] Tr. at 332-333.
[251] Tr. at 334-335.
[252] Tr. at 335-336.
[253] Tr. at 336.
[254] Tr. at 336, 348.
[255] Tr. at 338.
[256] Tr. at 338-339.
[257] Tr. at 339.
[258] Tr. at 339-340.

Mr. Smith testified that after defaults began, he attended a meeting in Dallas in April 2016 with PAC and ULG where Ms. Kern-Fuller stated that the investment product was not a security.[259] Mr. Smith testified that Ms. Plant was not present at this meeting but her name was mentioned a few times.[260] Mr. Smith testified that Ms. Kern-Fuller and Mr. Sutter seemed very close to the other parties present at the meeting and "there was hugs."[261] Mr. Smith testified that at this meeting, Ms. Kern-Fuller did not mention that this product had been the subject of cease and desist orders in any state.[262] Mr. Smith testified that he stopped selling the product when he first learned about the cease and desist orders in December 2015.[263] Mr. Smith testified that he did not know the cease and desist orders were all issued by default or that none of those orders took action against PAC or Ms. Plant.[264] Mr. Smith testified that he was never informed before or while selling the product that the transactions might be prohibited by federal law or that federal courts have ruled similar transactions unenforceable.[265]

Mr. Smith testified that ULG did not create the products or transactions, and ULG did not promote them, though he did not know whether ULG sold them.[266]

Mr. Smith testified that all investments have risks and that sound investments can change over time resulting in investors losing money.[267] However, Mr. Smith testified that the defaults in this case did not happen because of the economy or political changes but he believed they resulted from mismanagement and the viability of the assignments in light of the Federal Anti-Assignment Acts.[268]

Mr. Smith testified that, contrary to Ms. Strong's testimony, he went through the closing books and the sellers' credit reports with her and her husband.[269] Mr. Smith testified that after clients signed the closing books, Smith & Cox would keep the books on file and give copies to clients who asked.[270] Mr. Smith testified that the closing book stated that "Seller shall retain at all times complete control

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[259] Tr. at 340, 342-343, 366, 390.
[260] Tr. at 367.
[261] Tr. at 390.
[262] Tr. at 341.
[263] Tr. at 343-345, 389-390.
[264] Tr. at 371-372.
[265] Tr. at 344.
[266] Tr. at 347.
[267] Tr. at 350.
[268] Tr. at 374-375.
[269] Tr. at 357.
[270] Tr. at 359-360.

over the payments and the underlying asset described herein," which was his understanding of the transactions and what he told the investors.[271] Mr. Smith testified that the closing book stated that "By law, the Seller must maintain control over the pension itself at all times," which was his understanding of the transactions and what he told the investors.[272] Mr. Smith testified that he went through the risk disclosures with his clients.[273] Mr. Smith testified that the risk disclosures did not mention that the transactions could be prohibited by the Federal Anti-Assignment Acts, that courts have held these assignments to be unenforceable, or that the principal of BAIC had entered into consent orders.[274] On cross-examination, Mr. Smith acknowledged that the risk disclosures stated that "Pension income stream payments fall under regulatory restriction that restricts the assignment of the scheduled payments due thereunder," which Mr. Smith testified meant his clients were informed about restrictions regarding the assignment of payments.[275] Mr. Smith testified that he understood the transactions were not assignments, which allowed them to move forward.[276] Mr. Smith acknowledged that the vast majority of the closing books for his clients did not include an escrow and fee agreement for ULG, without which there was no way for the client to know when ULG's representation would begin.[277] On cross-examination, Mr. Smith testified that he received documents for his clients to sign other than the closing books, which could have included escrow and services agreements, though he did not recall whether each of his clients had signed an escrow agreement.[278]

Mr. Smith testified that he had not spoken with Ms. Plant or anyone at ULG prior to selling the product, though he thought he spoke with Ms. Plant at some point.[279] Mr. Smith testified that he received closing books via email from the distributor's back office, which he believed was Ms. Plant.[280]

Mr. Smith testified that he did not tell clients he collected a 1.5% commission.[281]

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[271] Tr. at 358; Exh. S-116 at ACC001491.
[272] Tr. at 358; Exh. S-116 at ACC001511.
[273] Tr. at 363-364, 383.
[274] Tr. at 381-382; Exh. S-116 at ACC001496-ACC001497, ACC001511-ACC001513.
[275] Tr. at 388; Exh. S-116 at ACC001511.
[276] Tr. at 388.
[277] Tr. at 380-381.
[278] Tr. at 387, 389.
[279] Tr. at 360-361.
[280] Tr. at 362.
[281] Tr. at 367.

Mr. Smith testified that Ms. Kern-Fuller had to change ULG's bank because ULG's original bank, with whom Ms. Kern-Fuller had a good relationship for years, did not want to transact this type of business.[282]

Mr. Smith testified that his clients may have received about $800,000 but they may have invested about $2.68 million.[283]

Charles D. Zimmerman - Personal Agent of Investor Trust

Mr. Zimmerman testified that he has been a Tucson, Arizona resident for 20 years and that he works as a personal agent for seniors, managing financial and personal affairs for elderly clients.[284] Mr. Zimmerman testified that he is a nationally certified guardian and a federal fiduciary for the VA.[285] Mr. Zimmerman testified that he had been an Arizona Supreme Court certified fiduciary for ten years until he voluntarily terminated his certification because proposed legislation would expose records of his clients, including active military intelligence, to third-party review.[286] Mr. Zimmerman testified that his experience in investments is limited to assisting clients who see investment advisors.[287]

Mr. Zimmerman testified that he invested in the military income stream investment on behalf of a client, Moreno Legacy Trust (the "Trust"), in March 2017.[288] Mr. Zimmerman testified that the Trust contained approximately $1 million from life insurance policies for Michael Moreno in trust to provide for his two children.[289] Mr. Zimmerman testified that he discussed investment options for the Trust with Joe DeSimone, who had handled Mr. Moreno's moneys and life insurance policy, and that Mr. Moreno's mother made the final decision on investments.[290] Mr. Zimmerman testified that they were looking for an investment where they could put the trust money in and receive monthly benefits.[291] Mr. Zimmerman testified that Mr. DeSimone presented the investment as ULG coordinating with veterans for their retirement benefits and the company providing insurance to keep the investors safe.[292]

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[282] Tr. at 375-376.
[283] Tr. at 355-356, 379-380.
[284] Tr. at 395.
[285] Tr. at 395-396, 441.
[286] Tr. at 396-397.
[287] Tr. at 432.
[288] Tr. at 397-399.
[289] Tr. at 398.
[290] Tr. at 399-401, 403.
[291] Tr. at 401.
[292] Tr. at 402-403, 441-442.

Mr. Zimmerman testified that Mr. DeSimone said credit checks would be done on the veterans, which he provided though Mr. Zimmerman did not review the reports.[293] Mr. Zimmerman testified that Mr. DeSimone spoke well of ULG and PAC, who "would be there if there was a default or a problem."[294] Mr. Zimmerman testified that he relied on Mr. DeSimone as his only contact before entering into the transactions and he did not rely on any information from anyone else.[295] Mr. Zimmerman testified that his understanding of ULG's role came from information that he got from Mr. DeSimone and ULG depositing money in the Trust's account.[296] Mr. Zimmerman testified that he did not receive any sales or marketing materials for the transactions.[297] Mr. Zimmerman testified that he had never spoken to Ms. Plant before the hearing and he did not rely upon advice from her or anyone at PAC before investing in the product.[298]

Mr. Zimmerman testified that the Trust purchased five income stream investments, three involving veterans' benefits.[299] Mr. Zimmerman testified that a Structured Asset Purchase Application signed by him and Mr. DeSimone reflects a purchase by the Trust for $59,954.59 identifying DFAS as the obligor to make monthly payments of $825 over a period of 96 months.[300] Mr. Zimmerman testified that he initialed a Contract for Sale of Payments for this investment and Mr. DeSimone went over the risks identified in the Acknowledgement of Risk section of this document.[301] On cross-examination, Mr. Zimmerman acknowledged that one provision in the risks advised that the seller retains sole control over the payments.[302] On re-direct, Mr. Zimmerman testified that the consideration section of the Contract for Sale of Payments stated that:

> Seller shall transfer and sell to Buyer at Closing one hundred percent (100%) of Seller's right, title, and interest in and to the Payments as described above after said payment is received from the Payment Source;

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[293] Tr. at 403-404, 438-439.
[294] Tr. at 404.
[295] Tr. at 430, 432-433, 442.
[296] Tr. at 439.
[297] Tr. at 439.
[298] Tr. at 440-441.
[299] Tr. at 405, 443.
[300] Tr. at 406-407; Exh. S-21 at ACC000409-ACC000410.
[301] Tr. at 407-408; Exh. S-21 at ACC000418-ACC000419.
[302] Tr. at 429-430; Exh. S-21 at ACC000418.

> provided, however, that the Payment Source and underlying asset shall remain at all times the sole property of Seller and shall remain under the sole control of Seller per federal and/or state law.[303]

Mr. Zimmerman testified that he thought this section meant the veteran kept the pension with the Trust having purchased enforceable rights to a portion of the pension payments each month.[304]

Mr. Zimmerman acknowledged that another section stated a risk factor that by law the seller must maintain control over the pension itself at all times.[305] Mr. Zimmerman acknowledged that another risk section stated that the buyer and seller intend the transaction to constitute a valid sale of payments and not impermissible assignments.[306] While this section also stated that "certain risks persist," Mr. Zimmerman testified that the only risk mentioned would be if the veteran died.[307] Mr. Zimmerman testified that he understood the transactions were permissible assignments with the veteran signing-off part of his pension to the Trust, though Mr. Zimmerman could not say that Mr. DeSimone specifically described them that way.[308] Mr. Zimmerman testified that he thought the veteran maintaining control of the pension enabled him to assign a part of it.[309] Mr. Zimmerman testified that pursuant to a Purchase Assistance Agreement, the purchase price was to be paid to ULG and all original documents were to be returned to ULG.[310] Mr. Zimmerman testified that he read and initialed a Disclosure of Risks Statement, though he did not recall Mr. DeSimone going over this document with him.[311] Mr. Zimmerman testified that he did not see any mention of federal statutes prohibiting the assignment or sale of veterans benefits in the documents regarding risks.[312] Mr. Zimmerman testified that Mr. DeSimone did not inform him of federal statutes prohibiting the assignment or sale of veterans benefits, or that there was a risk federal laws might prohibit these transactions.[313] Regarding the monthly payments, Mr. Zimmerman testified that it was "pretty much guaranteed that [ULG] had all

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[303] Tr. at 447-448; Exh. S-21 at ACC000418.
[304] Tr. at 448.
[305] Tr. at 434; Exh. S-21 at ACC000432.
[306] Tr. at 435-436; Exh. S-21 at ACC000414, ACC000418.
[307] Tr. at 448; Exh. S-21 at ACC000414, ACC000418.
[308] Tr. at 435-436, 438.
[309] Tr. at 446.
[310] Tr. at 408; Exh. S-21 at ACC000427-ACC000428.
[311] Tr. at 409, 434; S-21 at ACC000432-ACC000435.
[312] Tr. at 410; Exh. S-21.
[313] Tr. at 410-411.

the bases covered, and they were the ones that were going to gather and funnel the money" to the Trust."[314]

Mr. Zimmerman testified that he knew very little about PAC other than having been told that PAC "would step in if things went wrong and assure that we receive the money."[315] Mr. Zimmerman testified that he did not know who owned PAC or that anybody associated with PAC had a prior company that was subject to ten cease and desist orders for securities violations.[316]

Mr. Zimmerman testified that he signed an Escrow and Services Fee Agreement with ULG on behalf of the Trust.[317] Mr. Zimmerman testified that he understood ULG "put the package together" and represented everyone in the transaction, including the Trust, as an escrow company.[318] When presented with a Legal Services and Fee Agreement that stated the law firm only represents the distributor in these transactions and not the buyer, seller, or any other entity, Mr. Zimmerman testified that he was upset because he thought ULG had more of an obligation to the investors based on how the investment was presented by Mr. DeSimone.[319] Mr. Zimmerman testified that he did not believe he received any sales literature from Mr. DeSimone about the income stream investment.[320]

Mr. Zimmerman acknowledged that a PAC Option to Purchase Source Defaulted Structured Asset Agreement was signed by Ms. Plant for PAC.[321] Mr. Zimmerman also acknowledged that a PAC Option to Purchase Defaulted Structured Asset Agreement was signed by Ms. Plant as Vice President and COO for PAC.[322] Mr. Zimmerman testified that he knew nothing about Ms. Plant prior to entering into the investment transactions.[323] Mr. Zimmerman testified that he knows nothing about Ms. Plant's business background and he would not have invested if he knew Ms. Plant had worked with Mr. Gamber at the previous companies that had been the subject of cease and desist orders for securities fraud.[324] Mr. Zimmerman testified that he was not aware that the cease and desist orders were by

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[314] Tr. at 411, 433.
[315] Tr. at 411.
[316] Tr. at 412.
[317] Tr. at 412; Exh. S-21 at ACC000436-ACC000438.
[318] Tr. at 413-414.
[319] Tr. at 415-416; Exh. ULG-75 at 1 of 9.
[320] Tr. at 416.
[321] Tr. at 416-417; Exh. S-21 at ACC000446-ACC000449.
[322] Tr. at 417; Exh. S-21 at ACC000452-ACC000456.
[323] Tr. at 446-447.
[324] Tr. at 417-418.

default or that no actions were taken against PAC or Ms. Plant.[325]

Mr. Zimmerman testified about another structured asset purchase made by the Trust for $54,504.18 identifying DFAS as the obligor to make monthly payments of $750 over a period of 96 months.[326] Mr. Zimmerman testified about a third military income stream investment made by the Trust for $89,023.94 identifying the VA as the obligor to make monthly payments of $1,225 over a period of 96 months.[327] Mr. Zimmerman testified that he "felt extremely guaranteed that we would receive [the monthly payments] as it was government money that the veteran had assigned," and that Mr. DeSimone assured him it was guaranteed.[328] Mr. Zimmerman testified that the Trust expected to receive more money back than its principal without having to do anything other than invest money.[329] Mr. Zimmerman testified that the Trust had no control over payments and relied on others, including Mr. DeSimone and ULG for the investment to succeed.[330] Mr. Zimmerman testified that he understood the investment paperwork created a binding contractual obligation for the Trust to receive future monthly payments from the veterans' pension or disability benefits in exchange for the Trust's upfront lump sum investment.[331] Mr. Zimmerman testified that the investments worked out well until the beginning of 2019 when two of the three defaulted and stopped paying.[332] Mr. Zimmerman testified that ULG avoided his calls about the defaults and when he did speak with someone, likely Ms. Kern-Fuller, she said ULG was not responsible, though Mr. Zimmerman acknowledged that a civil law suit could make one reluctant to talk about something.[333]

When informed that ULG's attorney argued, before the United States District Court in South Carolina, that the veterans could at any time direct the federal government to stop sending monthly payments to ULG, Mr. Zimmerman testified that he would not have invested if anybody had disclosed this information to him.[334]

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[325] Tr. at 442.
[326] Tr. at 418-419; Exh. S-22 at ACC000460.
[327] Tr. at 419-420; Exh. S-23 at ACC000717.
[328] Tr. at 420, 437.
[329] Tr. at 421.
[330] Tr. at 421.
[331] Tr. at 421-422.
[332] Tr. at 422.
[333] Tr. at 423, 431-432.
[334] Tr. at 428.

Mr. Zimmerman testified that three of the five transactions the Trust entered into are still performing.[335] Mr. Zimmerman testified that he has not yet tried to collect from the two defaulting sellers in court.[336] Mr. Zimmerman testified that he was not aware that some buyers had gotten judgments in court against defaulting sellers.[337] Mr. Zimmerman testified that he did not know what fees Mr. DeSimone was paid for his role in the transactions.[338]

Frances Schlack - Investor

Ms. Schlack testified that she worked fourteen years as a legal assistant for a probate attorney in Tucson before she retired in 2013.[339] Ms. Schlack testified that she learned about the income stream investment from Mr. DeSimone, whom she came to meet after hearing him talk about a different investment on the radio.[340] Ms. Schlack testified that Mr. DeSimone explained the income stream investment as a safe investment with PAC providing protection if payments did not come.[341] Ms. Schlack testified that all of the information she received about the income stream transactions came from Mr. DeSimone and she relied solely on his advice to enter the transactions.[342] Ms. Schlack testified that before signing she did not read the entire collection of documents in the fulfillment kit for her transaction, though Mr. DeSimone went over the documents with her.[343] Ms. Schlack testified that she did not know how much Mr. DeSimone was paid from her investment.[344]

Ms. Schlack testified that she purchased the income stream investment for $39,708.97 in May 2017.[345] Ms. Schlack testified that at the time she made her investment, she was divorced with an annual income under $200,000 and a net worth under $1 million.[346] Ms. Schlack acknowledged that a PAC Option to Purchase Defaulted Structured Asset Agreement that she signed on May 2, 2017, was signed by Ms. Plant for PAC as Vice President and COO.[347] Ms. Schlack testified that she knew

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[335] Tr. at 439.
[336] Tr. at 443.
[337] Tr. at 443.
[338] Tr. at 439.
[339] Tr. at 455, 473, 483.
[340] Tr. at 456.
[341] Tr. at 456-457, 470, 472.
[342] Tr. at 470.
[343] Tr. at 473, 477-478; Exh. S-26.
[344] Tr. at 472.
[345] Tr. at 461; Exh, S-26 at ACC001177.
[346] Tr. at 492-493.
[347] Tr. at 459; Exh, S-26 at ACC001177-ACC001181.

nothing about the business background of Ms. Plant, the owners of PAC, or their business backgrounds.[348] Ms. Schlack testified that if she had known that one of Ms. Plant's prior employers was the subject of eight different cease and desist orders for securities violations, this information would have been important to her and she would not have wanted to be involved in the investment.[349] Ms. Schlack testified that she did not know that no actions were taken against Ms. Plant or PAC as part of those eight cease and desist orders.[350] Ms. Schlack testified that she had never spoken to Ms. Plant or anyone at PAC before the hearing, but she relied upon the verbiage in the contract that Ms. Plant signed.[351]

Ms. Schlack testified that she was supposed to receive a monthly payment of $475 for 10 years.[352] Ms. Schlack testified that she received regular monthly payments from July 2017 through December 2018, but they stopped after that, with payments since coming as distributions out of her IRA as opposed to coming from the VA.[353] Ms. Schlack testified that she discovered her payments had stopped when she asked Mr. DeSimone about her investment after she was contacted by the Division which was investigating possible problems with the investment.[354] Ms. Schlack testified that she did not know if she received any payments from PAC.[355] Ms. Schlack testified that she received $8,566.92 back from her original investment.[356]

Ms. Schlack testified that she was party to an Escrow Services and Fee Agreement which she understood made ULG the escrow services company in the transaction with ULG forwarding monthly payments to her IRA custodian.[357] Ms. Schlack testified that she has never been contacted by anyone at ULG, nor has she tried to contact them.[358]

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[348] Tr. at 459-460.
[349] Tr. at 460.
[350] Tr. at 485.
[351] Tr. at 481-483.
[352] Tr. at 462, 468; Exh, S-26 at ACC001142.
[353] Tr. at 462, 465-468, 479-480.
[354] Tr. at 466-467, 478-479.
[355] Tr. at 462.
[356] Tr. at 480.
[357] Tr. at 463-465; Exh, S-26 at ACC001161.
[358] Tr. at 467-468.

Ms. Schlack testified that her investment background included a couple annuities with Mr. DeSimone and CDs through banking institutions.[359] Ms. Schlack testified that the money she lost on the investment was for her retirement and it could have lasted her for several years.[360]

Ms. Schlack acknowledged that the Contract for Sale of Payments stated that:

> Seller agrees to execute such documents as necessary to effect an automatic draft from an existing account s/he owns where the payment is currently deposited so that the Buyer' s portion of the Payments may be sent to the Escrow Agent on or before the 2nd day of each month; however, the Payment Source shall remain at all times the sole property of Seller and shall remain under the sole control of Seller.[361]

Ms. Schlack testified that she understood that the money would first go to the veteran before going to the escrow agent for payment to her.[362]

A PAC Disclosure of Risks Statement stated:

> You may wish to purchase a private party contract that could mitigate specific defined risks. These private party contracts also carry risks. Those include, but are not limited to, that the company could go out of business or not have sufficient funds to pay their liabilities, Thus, if the party contract company was to cease business operations and/or there were insufficient funds to make payments in respect to the contracts, your transaction could be adversely affected.[363]

Ms. Schlack testified that she did not recall Mr. DeSimone going over this provision with her.[364] Ms. Schlack acknowledged signing the PAC Disclosure of Risks Statement on a page stating "I hereby attest that I have read and fully understand … that certain risks may still persist that are unknown to [PAC]."[365] When asked if this section also constituted advice, Ms. Schlack testified that it's part of the

[359] Tr. at 470-471.
[360] Tr. at 468.
[361] Tr. at 475; Exh. S-26 at ACC001138.
[362] Tr. at 475.
[363] Tr. at 485-486; Exh. S-26 at ACC001159.
[364] Tr. at 486.
[365] Tr. at 486; Exh. S-26 at ACC001160.

contract.[366]

Joseph R. DeSimone - Salesman

Mr. DeSimone testified that he has been a life insurance agent for almost thirty years residing in the Tucson, Arizona area since 1988.[367] Mr. DeSimone testified that he has been licensed through the Arizona Department of Insurance since 1990 or 1991 without ever having been subject to a disciplinary proceeding.[368] Mr. DeSimone testified that he sells financial products including annuities and that he sold the military income stream products to four clients in 2017: the Trust, Ms. Schlack, Michael Bradley, and Jean Hoag.[369]

Mr. DeSimone testified that he learned about the military income stream investments from Mr. Woodard, of FPD in Texas, who described them as income products for retirement.[370] Mr. DeSimone testified that the products were interesting to him because they were more attractive than a CD or fixed annuity product.[371] Mr. DeSimone testified that when he offered the products to his clients he did not know that Mr. Woodard had his securities license revoked by FINRA in 2016.[372] Mr. DeSimone testified that he has never spoken with Ms. Plant, nor anyone from ULG or PAC before his clients entered these transactions, and that he relied entirely on Mr. Woodard and the materials Mr. Woodard provided him.[373] Mr. DeSimone testified that he relied on "implicit authority" ULG and PAC gave to Mr. Woodard as evidenced by: the buyer's guide; Mr. Woodard acting as the contact person for questions and concerns; Mr. Woodard answering questions regarding missed payments when "nobody wanted to answer my call;" Mr. Woodard sending the due diligence packet to PAC for approval; and Mr. DeSimone receiving commissions from ULG and PAC.[374] Mr. DeSimone acknowledged that he could not know whether PAC or ULG approved the buyer's guide or gave information to Mr. Woodard, and that the implied authority was his assumption.[375] Mr. DeSimone testified that he met Mr. Woodard

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[366] Tr. at 486-487.
[367] Tr. at 523.
[368] Tr. at 524.
[369] Tr. at 524-525, 527-528. Mr. DeSimone testified that he thought he worked with the Trust a year earlier. Tr. at 528, 539.
[370] Tr. at 525-527.
[371] Tr. at 526.
[372] Tr. at 528.
[373] Tr. at 548-549, 567-568.
[374] Tr. at 568-569.
[375] Tr. at 569-570.

when he took a cold call from Mr. Woodard regarding income stream products.[376] Mr. DeSimone testified that he did due diligence on Mr. Woodard and FPD by asking around and doing internet searches.[377]

Mr. DeSimone testified that he received a buyer's guide from Mr. Woodard that he read before offering the product to clients.[378] The buyer's guide stated that:

> FPD and our partners in the Structured Assets business have revolutionized the purchase process of these assets. It's important to understand how our unique process protects you, and offers superior confidence in the transaction.[379]

Mr. DeSimone testified that he was attracted to the product by the protection of the involvement of a law firm that had done extensive due diligence.[380] The buyer's guide further stated:

> To further protect Buyers, we engage independent counsel through Upstate Law Group … to review all of the supporting documentation in the Closing Book to ensure the due diligence process is completed as set out in the Buyer's Purchase Assistance Agreement. Additionally, the utilization of ULG for closing the transactions and servicing the ongoing payments ensures a Buyer's funds are always in the hands of an insured escrow agent.[381]

Mr. DeSimone testified that it was significant to him that a licensed attorney in good standing was exercising due diligence and the standards of due care with this product.[382] Mr. DeSimone testified that he understood ULG represented his clients in this process.[383] Mr. DeSimone testified that his client, Mr. Bradley, purchased the veteran's disability income stream investment for $75,000 in exchange for 10 years of monthly payments of $898.93.[384] Mr. DeSimone testified that the Purchase

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[376] Tr. at 525, 549.
[377] Tr. at 527, 550.
[378] Tr. at 528-529; Exh. S-20.
[379] Tr. at 529; Exh. S-20 at ACC000325.
[380] Tr. at 530, 552.
[381] Tr. at 530; Exh. S-20 at ACC000327.
[382] Tr. at 530-531.
[383] Tr. at 531.
[384] Tr. at 532; Exh. S-24 at ACC000925.

Assistance Agreement for Mr. Bradley did not mention due diligence pertaining to the investment.[385]

The buyer's guide further stated:

> [FPD is] proud to have a contractual relationship with [ULG] to perform escrow, servicing, and account management for buyers of Structured Assets. … ULG is based in Easley, SC and has been servicing Payments derived from Structured Assets since 2012. Funds escrowed with ULG are held in an IOLTA account (Interest on Lawyers Trust Account) therefore legally segregated from the firm's operating account; and for further protection ULG maintains Lawyers' Professional Liability insurance.[386]

Mr. DeSimone testified that the use of an IOLTA account and the protection of professional liability insurance were significant to him.[387]

Mr. DeSimone testified that he read and considered the risk factors identified in the buyer's guide, which included the primary risk that a seller would breach his or her contractual obligation and not honor the agreement to direct payment to ULG as the escrow agent.[388] The buyer's guide stated that this risk would be mitigated by PAC by: 1) conducting due diligence to approve those sellers most able to honor the financial commitment, and 2) PAC would step in on payment for defaulting sellers pursuant to a PAC Option to Purchase Defaulted Structured Asset Agreement.[389] Mr. DeSimone testified that he considered it important that ULG was holding PAC Option funds paid to PAC in a separate IOLTA account to be used only for payments on defaults.[390] Mr. DeSimone testified that he did not consider PAC to be an insurance company or guarantee company, but PAC was a layer of protection that was paid 15½% of his clients' investments to follow up with late payments.[391] Mr. DeSimone testified that disclosure of risks in the buyer's guide did not mention that the veteran might

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[385] Tr. at 533; Exh. S-24 at ACC000979-ACC000983.
[386] Tr. at 534; Exh S-20 at ACC000330.
[387] Tr. at 534-535.
[388] Tr. at 535, 554, 584; Exh. S-20 at ACC000331.
[389] Tr. at 535-537; Exh. S-20 at ACC000331.
[390] Tr. at 537; Exh. S-20 at ACC000331.
[391] Tr. at 550-551, 562-563.

not honor the agreement to send payment to ULG because federal law prohibits the transaction.[392]

The buyer's guide stated that "PAC's ownership and management have careers spanning several decades in the financial services industry."[393] Mr. DeSimone testified that before offering the product to his clients, nobody informed him that Mr. Gamber was one of the owners of PAC.[394] Mr. DeSimone testified that it would have been important for him to know that Mr. Gamber and his companies had been subject to ten cease and desist orders for securities violations, that Ms. Plant had worked with Mr. Gamber at those companies, and that Ms. Plant was the Vice President and COO at PAC.[395] Mr. DeSimone testified that he was not aware that while orders in Arkansas and Texas mentioned Ms. Plant and PAC, those states declined to take action against Ms. Plant or PAC.[396]

Mr. DeSimone testified that Jean Hoag is a retired Arizona judge who wanted to rollover pension funds.[397] Mr. DeSimone testified that Ms. Hoag was married with a combined annual income less than $300,000 and a net worth over $1 million at the time she invested.[398] Mr. DeSimone testified that Michael Bradley is a retired wealthy individual who was looking for income for his everyday living needs.[399] Mr. DeSimone testified that Mr. Bradley was unmarried with an annual income less than $200,000 and a net worth over $1 million at the time he invested.[400] Mr. DeSimone testified that he provided the buyer's guide to his clients Ms. Hoag, Mr. Bradley and Ms. Schlack.[401] Mr. DeSimone testified that with the exception of Mr. Bradley, who seemed to consistently receive late payments, his clients were receiving payments without problems until January 2019 when they stopped receiving funds.[402] Mr. DeSimone testified that Mr. Bradley attempted to contact ULG or PAC about his not receiving funds but communication was difficult as nobody was being proactive with Mr. Bradley or "rush[ing] to return [his] call."[403] Mr. DeSimone testified that he became involved and contacted Mr.

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[392] Tr. at 584-585; Exh. S-20 at ACC000331.
[393] Tr. at 538; at Exh. S-20 at ACC000331.
[394] Tr. at 538.
[395] Tr. at 538-539.
[396] Tr. at 579-580.
[397] Tr. at 540.
[398] Tr. at 582.
[399] Tr. at 540.
[400] Tr. at 582-583.
[401] Tr. at 540-541, 559.
[402] Tr. at 541-542, 554, 580.
[403] Tr. at 542.

Woodard to find answers for his clients.[404] Mr. DeSimone testified that Mr. Woodard acted as liaison to ULG which gave "one excuse after another," and Mr. Woodard said that a payment company in Alabama became involved "because ULG was incompetent and couldn't handle processing the payments."[405] Mr. DeSimone testified that he contacted ULG himself after Mr. Woodard stopped answering calls and emails.[406]

Mr. DeSimone testified that before selling the investments, he learned from the documents and from Mr. Woodard that the title to the pensions could not be transferred, but payments could be drawn from the veteran's checking account.[407] Mr. DeSimone testified that he and his clients believed that his clients were getting enforceable rights to the payments that the veterans were receiving from the government.[408] Mr. DeSimone testified that he called ULG and could not get a return call until after he informed the State Bar of South Carolina, who contacted ULG on Mr. DeSimone's behalf.[409] Mr. DeSimone testified that he received a call from Brian at ULG who said that "all we do around here is process the payments" before saying he would look into the matter and get back to Mr. DeSimone, which he never did.[410] When asked on cross-examination whether he was told that ULG could not talk to him because he was not their client, Mr. DeSimone testified "[t]hat sounds like something they would do."[411]

On cross-examination, Mr. DeSimone testified that all investments and income stream products have potential risks.[412] Mr. DeSimone testified that he discussed with his clients the risk that veterans could stop sending payments.[413]

Mr. DeSimone testified that Ms. Schlack had a $39,000 investment from which he received a commission of approximately $2,700-2,800.[414] Mr. DeSimone testified that he offered these products to his clients because he wanted to offer them choices, not because of the commission he would

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[404] Tr. at 543.
[405] Tr. at 543-544.
[406] Tr. at 546.
[407] Tr. at 544-545.
[408] Tr. at 545.
[409] Tr. at 547.
[410] Tr. at 547.
[411] Tr. at 561.
[412] Tr. at 555.
[413] Tr. at 555.
[414] Tr. at 556.

receive.[415] On cross-examination, Mr. DeSimone testified that Ms. Hoag is no longer using his services.[416]

Mr. DeSimone testified that he dealt primarily with Mr. Zimmerman for the Trust.[417] Mr. DeSimone testified that he did not give Mr. Zimmerman the impression that the transaction was fail-safe and did not tell Mr. Zimmerman that the transaction was extremely guaranteed.[418]

Mr. DeSimone testified that he did not enter into any agreements with the Commission in exchange for his testimony.[419]

Mr. DeSimone acknowledged that the Contract for Sale contained an Acknowledgment of Risk section stating that the seller shall retain at all times complete control over the payments and the underlying asset, which Mr. DeSimone testified was his understanding as well.[420]

Mr. DeSimone testified that he would have reviewed a disclosure of risks section that included a statement that "[p]ension payments fall under regulations that restrict the assignment of the scheduled payments due thereunder."[421] On re-direct, Mr. DeSimone testified that nothing in the risk disclosure stated that federal statutes don't just restrict but prohibit the assignment of the scheduled payments.[422] The disclosure of risks further stated that "by law, the Seller must maintain control over the pension itself **at all times**" of which Mr. DeSimone testified that he was aware and had communicated to his clients.[423]

Mr. DeSimone testified that Ms. Hoag was approximately 70 at the time of the transactions, Mr. Bradley was approximately 60 at the time of the hearing, and the beneficiary of the Trust, Mr. Moreno's mother, is elderly.[424]

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[415] Tr. at 584.
[416] Tr. at 557.
[417] Tr. at 558.
[418] Tr. at 558.
[419] Tr. at 560.
[420] Tr. at 562.
[421] Tr. at 565-566; Exh. S-21 at ACC000432.
[422] Tr. at 585; Exh. S-21 at ACC000432.
[423] Tr. at 566; Exh. S-21 at ACC000432. Bold and underscore in original.
[424] Tr. at 566-567.

Mr. DeSimone acknowledged that the FPD Structured Asset Purchase Application stated that:

> Buyer acknowledges and agrees that FPD and its engaged professionals are not providing, and do not provide, any legal, tax, financial, or other advice of any nature to Buyer regarding this transaction. Buyer is strongly recommended to consult his/her own professional advisor(s) regarding these matters.[425]

Mr. DeSimone testified that he filed a bar complaint against Ms. Kern-Fuller in South Carolina.[426]

William Woerner - Division Investigator

Mr. Woerner testified that he is the Division's investigator assigned to this case.[427] Mr. Woerner testified that he has a bachelor of science degree in accounting and he worked for a CPA firm for eight months before joining the Federal Bureau of Investigation ("FBI").[428] Mr. Woerner testified that he worked 25 years for the FBI as an agent and then a supervisor in matters of white collar crime, internal affairs, and public corruption before retiring in July 2013 as the acting head of the Nevada office.[429] Mr. Woerner testified that after leaving the FBI, he worked three years as a director of corporate security for Wynn Resorts before moving to Phoenix where he has been a Division investigator for approximately three and a half years.[430]

Mr. Woerner testified that he familiarized himself with the file when he was assigned this case in November 2018, taking over from the previously assigned investigator who was leaving employment with the Division.[431] Mr. Woerner testified that the Division's investigation began in 2015 or 2016 when Ed Hannsz, an attorney in the Division's compliance and registration section, received a call from the Texas Securities Division alerting him that an investment advisory firm in Tucson was selling unregistered and fraudulent investment contracts.[432] Mr. Woerner testified that on October 3, 2016,

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[425] Tr. at 570-571; Exh. S-24 at ACC000959.
[426] Tr. at 586-587.
[427] Tr. at 590, 596.
[428] Tr. at 590-591.
[429] Tr. at 591-595.
[430] Tr. at 595-596.
[431] Tr. at 596-597.
[432] Tr. at 598.

Mr. Hannsz sent a letter to Mr. Smith of Smith & Cox requesting documents, pursuant to A.R.S. § 44-3132, which were provided by thumb drive.[433] Mr. Woerner testified that the documents submitted by Mr. Smith included an agent agreement enabling Smith & Cox to promote and market products offered and made available by SMI, signed by Mr. Smith for Smith & Cox and K. Snyder for SMI.[434] Mr. Woerner testified that Smith & Cox also submitted substantially identical form documents for 53 investments made between 2013 and 2015, identifying either BAIC or SoBell.[435] Mr. Woerner testified that after reviewing the documents from Mr. Smith, Mr. Hannsz referred the matter to the Division's enforcement section for a thorough investigation.[436]

Mr. Woerner testified that the Division received documents from Mr. DeSimone on or about June 20, 2017, after the Division was informed by an investment advisory firm that Mr. DeSimone was selling possibly prohibited income stream investments.[437] Mr. DeSimone testified that the fulfillment kits for Mr. DeSimone's clients, the Trust, Mr. Bradley, Ms. Hoag, and Ms. Schlack, were substantially identical to one another as well as to the Smith & Cox investment documents other than having the name SoBell or BAIC.[438] Mr. Woerner testified that the documents obtained by the Division pursuant to this investigation have been received pursuant to the Division's policies and kept in the Division's offices.[439]

Mr. Woerner testified that the Division learned through investigation that BAIC was an Andrew Gamber company used by Mr. Gamber after Voyager Financial Group ("VFG").[440] Mr. Woerner testified that BAIC was formed in Texas on July 20, 2012, as a for-profit corporation with Katherine Snyder listed as President and Director.[441] Mr. Woerner testified that in BAIC's 2014 and 2015 Texas franchise tax public reports, Mr. Gamber was identified as President.[442] Mr. Woerner testified that SoBell filed articles of incorporation in Mississippi effective February 5, 2015, listing Mr. Gamber as

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[433] Tr. at 599; Exhs. S-69, S-70.
[434] Tr. at 600; Exh. S-71.
[435] Tr. at 601-602; Exh. S-80 – S-132.
[436] Tr. at 603.
[437] Tr. at 604-605; Exh. S-11.
[438] Tr. at 605-606; Exh. S-21 – S-26.
[439] Tr. at 606-607.
[440] Tr. at 607-608.
[441] Tr. at 608-609; Exh. S-55.
[442] Tr. at 609; Exh. S-55 at ACC005835-ACC005836.

the incorporator and identifying a business email prefix of "drew.gamber."[443] Mr. Woerner testified that the current status of SoBell is dissolved.[444]

Mr. Woerner testified that the Division's investigation of Mr. Gamber uncovered an April 14, 2008 consent order that Mr. Gamber entered into with the Insurance Commissioner of Arkansas alleging Mr. Gamber misrepresented the terms of an insurance contract, committed forgery, and committed fraud.[445] Mr. Woerner testified that a second consent order with the Insurance Commissioner of Arkansas, dated July 1, 2009, included allegations of conducting insurance business without a valid insurance producer license, misrepresentation of the terms of an insurance contract, and fraud.[446]

Mr. Woerner testified that an Arkansas Securities Commissioner Cease and Desist Order ("First Arkansas Order"), dated April 22, 2013, ordered Mr. Gamber, VFG, and others to cease and desist from further actions in Arkansas in connection with the offer or sale of securities.[447] Mr. Woerner testified that Mr. Gamber signed an Iowa Insurance Commissioner Order and Consent to Order and Agreement, dated September 19, 2013, whereby VFG and Mr. Gamber consented "to cease and desist any future operations in Iowa related to the buying and selling of income stream investments" and they were ordered to cease and desist violating Iowa securities laws.[448] Mr. Woerner testified that a New Mexico Order to Cease and Desist and Notice of Intent to Impose Sanctions (Corrected), dated December 10, 2013, found that VFG deceived investors by representing the sale of income streams as annuities or accounts receivable and by representing the transaction as valid and not an impermissible assignment when, in fact, United States government pensions and disability benefits may not be assigned or attached under 37 U.S.C. § 701 and/or 38 U.S.C. § 5301; and that VFG omitted the material fact that an assignment of income streams is prohibited under these federal statutes.[449] Mr. Woerner testified that on March 18, 2014, Arkansas issued a Second Cease and Desist Order ("Second Arkansas Order") that found VFG violated Arkansas securities laws in part by omitting to disclose material

[443] Tr. at 610-611; Exh. S-56.
[444] Tr. at 611; Exh. S-57.
[445] Tr. at 613; Exh. S-77.
[446] Tr. at 614; Exh. S-78.
[447] Tr. at 615-616; Exh. S-28.
[448] Tr. at 616-617; Exh. S-29.
[449] Tr. at 617-618; Exh. S-30.

information and making material misstatements.[450] The Second Arkansas Order stated that the contract for sale of payment provided:

> Both parties intend that the transaction(s) contemplated by this contract for sale shall constitute valid sale(s) of payments and shall not constitute impermissible assignment(s), transfer(s), or alienation of benefits by sellers as contemplated by applicable laws; however, certain risks exist.[451]

Mr. Woerner testified that this language was substantially identical to that used in the contracts for sale of payments in the Smith & Cox and Mr. DeSimone investments in this case.[452] The Second Arkansas Order further stated that VFG omitted to provide a full and complete disclosure of specific risks and that the above quoted section of the contract for sale of payments misstated federal laws and court cases that clearly prohibit the assignment or transfer of federal pension payments.[453]

Mr. Woerner testified that Mr. Gamber signed a Pennsylvania Consent Agreement and Order ("Pennsylvania Order"), filed May 12, 2014, stating that VFG's assignments were securities and that some or all of the assignments sold to Pennsylvania residents were assignments of rights to monthly payments from military pensions, and the assignment of military pensions is prohibited by 38 U.S.C. § 5301.[454] The Pennsylvania Order further stated that VFG failed to disclose material information including the identity and relevant background of VFG corporate officers, VFG's operating history, and that the assignment of military pensions is prohibited by 38 U.S.C. § 5301.[455]

Mr. Woerner testified that Mr. Gamber signed an Arkansas Consent Order, dated June 14, 2013, that stated VFG facilitated approximately 317 sales in 31 states for an estimated total of $34,245,351.48 and received an estimated $6,724,049.71 in commissions.[456] Mr. Woerner testified that a Florida Final Order and Notice of Rights as to VFG, filed August 26, 2014, found that VFG violated Florida securities laws and stated that "[b]ecause the buyer would not acquire title or ownership of the

[450] Tr. at 618-620; Exh. S-31.
[451] Exh. S-31 at ACC006198.
[452] Tr. at 619.
[453] Exh. S-31 at ACC006198.
[454] Tr. at 621; Exh. S-32.
[455] Tr. at 621-622; Exh. S-32.
[456] Tr. at 622-623; Exh. S-33.

underlying asset that provides the stream, sellers could redirect the stream back to themselves at any time, leaving the buyers with only a legal claim."[457] Mr. Woerner testified that a California Desist and Refrain Order, dated November 7, 2014, found VFG violated California securities laws because:

> [VFG] failed to fully disclose to potential investors that:
>
> a. The assignment of United States government pensions and disability benefits is prohibited by federal law, specifically 37 United States Code, section 701, and 38 United States Code, section 5301; and
>
> b. The investors did not acquire title or ownership of the underlying asset that provided the income stream from the government payment, but merely a potential contractual right to receive the income stream. Sellers, who lawfully retained the legal right to receive the government payments, could redirect the income stream away from Voyager's control at any time, leaving the investors with only a potential legal claim for recovery of the government payments against the sellers.[458]

Mr. Woerner testified that the Texas State Securities Board entered an Emergency Cease and Desist Order ("Texas Order"), dated February 1, 2016, against SoBell and Mr. Gamber ordering that they cease and desist violating Texas securities laws.[459] The Texas Order made a finding of fact that "[t]he investor is provided with the option to elect to receive a corporate promissory note to be issued by [PAC] in the event of default of payments by the pensioner."[460] The Texas Order also found that SoBell and Mr. Gamber intentionally failed to disclose that after the First Arkansas Order, sales of substantially the same investment as VFG were made by BAIC which was subsequently controlled by Mr. Gamber.[461] The Texas Order further found that SoBell and Mr. Gamber intentionally failed to disclose that Ms. Plant, the Vice President of PAC, was also the Director of Compliance for VFG.[462]

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[457] Tr. at 623-625; Exh. S-34.
[458] Tr. at 625-626; Exh. S-35.
[459] Tr. at 626, 628; Exh. S-36.
[460] Tr. at 626-627; Exh. S-36 at ACC006234.
[461] Tr. at 627; Exh. S-36 at ACC006235-ACC006236.
[462] Tr. at 628; Exh. S-36 at ACC006235-ACC006236.

On cross-examination, Mr. Woerner acknowledged that the Texas Order was issued after Smith & Cox's last sale and, therefore, ULG could not have been aware of the Texas Order at that time.[463] On re-direct, Mr. Woerner testified that the sales made by Mr. DeSimone came after the Texas Order was issued.[464]

Mr. Woerner testified that the Mississippi Secretary of State Securities Division issued a Cease and Desist Order ("Mississippi Order"), dated February 23, 2017, against SoBell, BAIC, VFG, and Mr. Gamber (collectively "Mississippi Respondents").[465] The Mississippi Order found that the Mississippi Respondents failed to disclose to investors regulatory orders from other states against Mr. Gamber, VFG, and SoBell.[466] The Mississippi Order found that "[i]n offering the investment contract products from Mississippi (through SoBell), or to Mississippi residents (through BAIC), or to residents of other states (through VFG), [Mississippi] Respondents failed to disclose the assets, liabilities, operating history, as well as the control persons and inherent conflicts of PAC, which underwrote the [PAC Option]."[467] The Mississippi Order also found that the Mississippi Respondents "failed to disclose to potential investors that the assignment of United States Government Pensions and disability benefits is prohibited by federal law, specifically 37 United States Code, Section 701 and 38 United States Code, Section 5301."[468] The Mississippi Order further found that:

> Because of the similarities between the products offered, the offer and marketing methods, the substantive materials used in marketing and effecting transactions, and the overlapping parties, particularly Gamber, ULG and PAC; BAIC, which has sold products into Mississippi, SoBell, which was formed in Mississippi, and VFG are indistinguishable ventures.[469]

On cross-examination, Mr. Woerner acknowledged that the Mississippi Order was issued after Smith & Cox's last sale and, therefore, ULG could not have been aware of the Mississippi Order at that

[463] Tr. at 685, 738.
[464] Tr. at 739.
[465] Tr. at 628; Exh. S-37.
[466] Tr. at 628-629; Exh. S-37.
[467] Tr. at 629; Exh. S-37 at ACC006246.
[468] Tr. at 629; Exh. S-37 at ACC006247.
[469] Tr. at 629-630; Exh. S-37 at ACC006247.

time.[470] On re-direct, Mr. Woerner testified that the sales made by Mr. DeSimone came after the Mississippi Order was issued.[471]

Mr. Woerner testified that the Division received an email, dated May 1, 2019, from Gray Turner, an attorney with the Arkansas Department of Insurance who stated that he was performing a background investigation of Ms. Plant, who had applied for an insurance producer license in Arkansas.[472] Mr. Turner related that he had discovered the Commission's action against Ms. Plant and he provided information submitted by her regarding the Commission's action.[473] Mr. Turner wrote that Ms. Plant denied ever living in Mississippi, where the Division attempted personal service, and he provided an Arkansas address that she gave as her residence in her Arkansas license application.[474] Mr. Woerner testified that after the Division received this email, he recalled attending a Division meeting where it was discussed that while Ms. Plant had been served properly under the Commission's rules, a process server was directed to serve Ms. Plant at the Arkansas residence address with the Notice and a Procedural Order with the date of the hearing.[475] Mr. Woerner testified that he had no documentation or evidence that Ms. Plant had personal knowledge of this action before the Commission until May 2019.[476]

Mr. Turner's email included an attachment containing Ms. Plant's answers to questions regarding the Commission action.[477] Mr. Woerner testified that he was unaware Ms. Plant was not informed that the questions asked by Mr. Turner were in response to a cease and desist order or that the responses would be shared with the Division.[478] Ms. Plant wrote that she had no knowledge of the Commission's action, she never resided in Mississippi, and she had not received service sent to PAC's former business address in Mississippi, which ceased being used once PAC went out of business in 2017, before the Commission's service in August 2018.[479] On re-direct, Mr. Woerner noted that the

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[470] Tr. at 685, 738.
[471] Tr. at 739.
[472] Tr. at 630; Exh. S-171.
[473] Tr. at 630; Exh. S-171 at ACC002368.
[474] Tr. at 630-631; Exh. S-171 at ACC002368.
[475] Tr. at 631.
[476] Tr. at 695.
[477] Tr. at 631-632; Exh. S-171.
[478] Tr. at 760.
[479] Tr. at 696-697; Exh. S-171 at ACC002370.

PAC Options signed by Ms. Plant referenced a PAC contact email address with a prefix of "mplant" and provided a PAC mailing address in Mississippi that the Division used to serve the Notice on Ms. Plant in August 2018 by certified mail.[480] On re-cross, Mr. Woerner acknowledged that businesses may have main headquarters in a state where some of the employees have never been.[481] Ms. Plant wrote that in 2012 her position with VFG became Director of Compliance.[482] Ms. Plant wrote that while Mr. Gamber told those working for VFG that VFG had done nothing wrong, Mr. Gamber said he was going to temporarily stop doing business in Arkansas and get a company running that would be better aligned with what Arkansas wanted to see done differently.[483] Ms. Plant wrote that no one at VFG was provided a copy of the Arkansas paperwork or knew about a consent order.[484] Ms. Plant wrote that three attorneys worked daily in VFG's office and, to Ms. Plant's knowledge, none of them expressed concerns about VFG's practices, nor did two new attorneys who were hired when VFG changed offices.[485] Ms. Plant wrote that she then went to work for BAIC from May 2013 until the end of February 2014 as the Director of Compliance.[486] Ms. Plant wrote that she worked as an independent contractor for SoBell, under the direction of Mr. Gamber, from the end of 2014 through mid-2015.[487] Ms. Plant wrote that she worked as an employee for PAC from March 2014 through May 2016 before becoming the Vice President and COO from May 2016 through December 2016.[488] Ms. Plant wrote that she is not, and never has been, a control person of PAC.[489] Ms. Plant wrote that Mr. Gamber's company, AAG Holdings, was a part owner of PAC and he was involved in regular meetings regarding PAC.[490] Ms. Plant wrote that Mr. Gamber had told her when she was working at BAIC that he was creating a debt arbitrage company that would provide options to buyers by doing a more in-depth review of sellers before the sale and offering to purchase the contract from the buyer if the seller

[480] Tr. at 741-744; Exhs. S-39 at ACC002204-ACC002208, ULG-6 at 76-80 of 203.
[481] Tr. at 755.
[482] Tr. at 632; Exh. S-171 at ACC002373.
[483] Tr. at 632-633, 698; Exh. S-171 at ACC002374.
[484] Tr. at 698; Exh. S-171 at ACC002374.
[485] Tr. at 699-700; Exh. S-171 at ACC002373.
[486] Tr. at 633; Exh. S-171 at ACC002374.
[487] Tr. at 633; Exh. S- 171 at ACC002375.
[488] Tr. at 633-634; Exh. S-171 at ACC002375.
[489] Tr. at 697; Exh. S-171 at ACC002370.
[490] Tr. at 634; Exh. S-171 at ACC002375.

defaulted with PAC pursuing the sellers for payment.[491] Ms. Plant wrote that in October or November of 2015, PAC's other principal, Katharine Snyder, discovered that Mr. Gamber had been "lying about a number of very serious issues" and Ms. Snyder took action to block Mr. Gamber from further involvement with PAC while establishing a new company.[492] Ms. Plant wrote that she was employed by LFO from January 2017 to February 2019 as COO and had the same duties that she had with PAC.[493]

Mr. Woerner testified that Mr. Corbett is a California resident whose job was to find veterans willing to sell a portion of their pensions through Mr. Gamber's companies, for which Mr. Corbett received commissions when the investments closed.[494] Mr. Woerner testified that he was not aware of any finders used by SMI other than Mr. Corbett.[495] Mr. Woerner testified that the Division took the examination under oath of Mr. Corbett on April 26, 2019.[496] Mr. Woerner testified that Mr. Corbett stipulated ("CFPB Stipulation") to a consent order with the United States Bureau of Consumer Financial Protection ("CFPB Order") whereby Mr. Corbett was found to have violated provisions of the Consumer Financial Protection Act as a result of his involvement in the income stream investments which were found to have victimized the veterans involved.[497] On cross-examination, Mr. Woerner acknowledged that the CFPB Order did not have Mr. Corbett's signature, though Mr. Corbett did sign the CFPB Stipulation that stated he agreed to the facts described in the CFPB Order but without admitting or denying any wrongdoing.[498]

Mr. Woerner testified that Mr. Woodard was previously registered in Arizona as a stockbroker before his registration status was terminated and that Mr. Woodard has been barred by FINRA from association with any FINRA member since July 8, 2016.[499] Mr. Woerner testified that Financial Product Distributors was formed as a Delaware limited liability company on November 2, 2012.[500]

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[491] Tr. at 634; Exh. S-171 at ACC002375.
[492] Tr. at 634-635; Exh. S-171 at ACC002375-ACC002376.
[493] Tr. at 636; Exh. S-171 at ACC002376.
[494] Tr. at 636-637.
[495] Tr. at 674-675.
[496] Tr. at 637-638; Exh. S-172.
[497] Tr. at 638-640; Exhs. S-154, S-155.
[498] Tr. at 671, 736-738, 752-753; Exhs. S-154, S-155.
[499] Tr. at 641-643; Exhs. S-13, S-14, S-15.
[500] Tr. at 643; Exh. S-45a.

Commission certifications state that from January 1, 2017, through February 8, 2019, the following persons and entities had not registered securities and were not registered or licensed as securities dealers, securities salesmen or investment advisors: PAC, Ms. Plant, FPD, Mr. Woodard, Mr. Corbett, ULG, and Ms. Kern-Fuller.[501] Commission certifications state that between October 1, 2013 through November 9, 2018, the following persons and entities had not registered securities and were not registered or licensed as securities dealers, securities salesmen or investment advisors: Mr. Gamber, SoBell, and BAIC.[502]

Mr. Woerner testified that he completed a summary exhibit spreadsheet, started by the previously assigned Division investigator, that shows the 53 veteran income stream investments involving Smith & Cox.[503] Mr. Woerner testified that these 53 investments were made by 21 different investors between October 28, 2013 and November 17, 2015, totaling $2,776,952.62.[504] Mr. Woerner testified that a similar summary exhibit spreadsheet was created showing the six investments involving Mr. DeSimone that were sold from March 17, 2017, through May 23, 2017.[505] Mr. Woerner testified that these six investments were made by four different investors and totaled $371,191.23.[506] Mr. Woerner testified that he also made a summary exhibit spreadsheet of information contained in the closing sheets, from the portion of those 53 Smith & Cox investments which had closing sheets included in the closing books, to illustrate who received payments from the investors' funds.[507] Mr. Woerner testified that the closing sheets which existed showed a total of $1,404,259.17 invested, of which $775,901.38 was paid to the veterans, $23,899.96 was paid to Mr. Corbett as commissions, $182,483.03 was profit to BAIC, $71,465.46 was paid to Smith & Cox as commissions, and $48,695.62 was paid in fees to ULG.[508] Of the 53 investments, 23 did not have closing sheets and, therefore, those funds were not reflected in the totals above.[509] Mr. Woerner testified that he did not do an accounting of the monies the investors were repaid, but he had no reason to dispute that the 59 investments paid

[501] Tr. at 643-644; Exhs. S-1 – S-7.
[502] Tr. at 644-645; Exhs. S-53a – S-53c.
[503] Tr. at 645-651; Exh. S-79.
[504] Tr. at 651; Exh. S-79.
[505] Tr. at 656-659; Exh. S-42.
[506] Tr. at 658-659; Exh. S-42.
[507] Tr. at 652-654; Exh. S-134.
[508] Tr. at 654-655; Exh. S-134.
[509] Tr. at 655-656; Exh. S-134.

money back from the original investment amounts.[510] Mr. Woerner testified that he had no reason to dispute ULG's spreadsheet exhibit asserting that 26 investors were paid back at least $592,000, though not all of the Smith & Cox investors were included and other listed investments are not part of this action.[511] Mr. Woerner testified that another spreadsheet exhibit from ULG also listed investors not in this case.[512] Mr. Woerner testified he believed that ULG, based on its "role as the escrow agent and the clearinghouse for both the moneys going out and coming in," would be the best source to provide an accounting of the money returned to the investors as the Division did not pose this question to all of the investors and some of the investors who were asked were unable to calculate an answer.[513] Mr. Woerner testified that the Division hoped ULG would provide an accurate accounting at the hearing in this case.[514]

Mr. Woerner testified that during the course of his investigation he did not uncover any information that suggested ULG either sold or promoted the product.[515] Mr. Woerner testified that he had reason to believe that ULG participated in the drafting of documents contained within the closing book.[516] Mr. Woerner testified that ULG served as an escrow agent in these transactions.[517] Mr. Woerner testified that he understood that ULG would receive the entire veteran's pension, keep a portion due to the buyer, and send the remainder back to the veteran.[518] Mr. Woerner testified that at some point this flow of funds was changed to an ACH transaction.[519] Mr. Woerner testified that when income streams came in to ULG, ULG would send the agreed upon monthly amount to the buyers until there were defaults when ULG stopped receiving the veterans' payments.[520] Mr. Woerner testified that he understood the seller always had the right to contact the pension and direct them where to send the payments.[521] Mr. Woerner testified that he did not believe ULG had a right to demand payment from

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[510] Tr. at 689, 691-692.
[511] Tr. at 692, 745-748, 752; Exhs. ULG-73, S-42, S-79.
[512] Tr. at 748-749; Exh. ULG-9.
[513] Tr. at 692-694, 750-751.
[514] Tr. at 762.
[515] Tr. at 662.
[516] Tr. at 662-663.
[517] Tr. at 676.
[518] Tr. at 678.
[519] Tr. at 678.
[520] Tr. at 678-681.
[521] Tr. at 681.

the pension when a default occurred, nor had he seen any documents executed by the sellers giving ULG that right.[522] Mr. Woerner testified that ULG received checks from the buyers and ULG disbursed lump sum payments to the sellers as agreed.[523]

Mr. Woerner testified that approximately eight to ten cease and desist orders were issued against Mr. Gamber or his entities, all of which were default orders or consent orders signed by Mr. Gamber, and none of which were litigated on their merits.[524]

Mr. Woerner testified that he had no knowledge of a Texas grand jury being convened that returned no indictments on these transactions.[525]

Mr. Woerner testified that the Division exchanged information with the Arkansas Insurance Commission during the course of this investigation.[526]

Mr. Woerner testified that the transactions involved buyers, sellers, as well as licensed investment advisors (Smith & Cox) or a licensed insurance producer (Mr. DeSimone).[527] Mr. Woerner testified that he did not know specifically whether ULG played a role in finding buyers or sellers.[528] Mr. Woerner testified that SMI served as a distributor to identify individuals who would enlist investors in the income stream investments.[529] Mr. Woerner testified that he did not know definitively who the principals were in SMI, but he believed Ms. Snyder, Mr. Chrustawka, and Mr. Bodenhamer were involved.[530]

Mr. Woerner testified that aside from military pensions, people have been selling income streams for years in this country, as well as viatical contracts and structured settlements.[531]

Mr. Woerner testified that PAC made some payments to investors after their income stream payments defaulted.[532] Mr. Woerner testified that he understood that some of the investors elected a PAC Option whereby a percentage of the purchase price went to PAC who was to use those proceeds

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[522] Tr. at 681-682.
[523] Tr. at 679.
[524] Tr. at 666-667, 672, 754.
[525] Tr. at 667.
[526] Tr. at 668-670.
[527] Tr. at 672-673.
[528] Tr. at 673-674.
[529] Tr. at 674.
[530] Tr. at 674, 703.
[531] Tr. at 679-680.
[532] Tr. at 683.

to reimburse investors whose income streams defaulted.[533] Mr. Woerner testified he would characterize this activity by PAC "in layman's terms as a form of insurance."[534]

Mr. Woerner testified that Ms. Snyder's name was on incorporation documents for BAIC, she was associated with PAC, and later LFO, and according to testimony at the hearing, SMI.[535]

On cross-examination, Mr. Woerner testified that he may have been aware that moneys were always drafted from a seller's account in all of Mr. DeSimone's cases.[536] On cross-examination, Mr. Woerner testified that he was not aware that in all DFAS cases only the amount of the contract was sent to ULG each month under an allotment.[537]

One version of the Contract for Sale of Payments provided that:

> Seller shall direct that the Payments will be received and serviced by the Escrow Company in connection with the closing of the sale of the Payments (the "Closing"); provided, however, that the Payment Source shall remain the sole property of Seller and shall remain under the sole control of the Seller.[538]

Another version of the Contract for Sale of Payments directed the seller to select one of two options:

> 4.1 Seller agrees to direct Payments to be received and serviced by the Escrow Company in an amount from which the Buyer shall be paid in connection with the closing of the sale of the Payments ("Closing"), and any additional amounts received over and above the Payments shall be sent to Seller per his/her instructions; provided, however, that the Payment Source and underlying asset shall remain at all times the sole property of the Seller and shall remain under the sole control of Seller per federal and/or state law; or

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[533] Tr. at 683.
[534] Tr. at 684.
[535] Tr. at 686.
[536] Tr. at 705.
[537] Tr. at 705-706.
[538] Tr. at 708; Exh. ULG-13 at 15 of 75.

> 4.2 Seller agrees to execute such documents as necessary to affect an automatic draft from an existing account s/he owns where the payment is currently deposited, so that the Buyer' s portion of the Payments may be sent to the Escrow Agent on or before the 2nd day of each month; provided, however, that the Payment Source and underlying asset shall remain at all times the sole property of Seller and shall remain under the sole control of Seller per federal and/or state law.[539]

Mr. Woerner testified that he did not take note of documents that were collected by PAC as part of the closing books as opposed to other entities in previous transactions.[540] The Disclosure of Risks form in the PAC closing book contained a section on Effective Rate of Return, not present in the other closing books, which stated that the transaction had risks that may impact the actual return if the seller breaches his or her obligations under the contract and the Effective Rate of Return is not guaranteed.[541] The PAC closing book contained a Payment and Account Verification document that designated an account for the disbursement of payments from the Contract for Sale of Payments whereas the other closing books contained a Change of Payment Address Verification that designated a change of payment address for the disbursement of the seller's income stream in accordance with the Contract for Sale of Payments.[542] The PAC closing books also contained a bank ACH authorization that was not present in the other closing books.[543] Mr. Woerner testified that he had no reason to disbelieve that the six DeSimone cases all involved the seller setting up an ACH from their account to be pulled monthly by the escrow company.[544]

John Patrick Freeman - Expert Witness for the Division

Mr. Freeman testified that he holds a bachelor's degree in accounting from Notre Dame in 1967, a law degree from Notre Dame in 1970, and an LL.M. from the University of Pennsylvania Law School in 1976.[545] Mr. Freeman testified that he studied securities law and wrote about landmark securities

[539] Tr. at 709-710; Exh. ULG-6 at 41-42 of 203.
[540] Tr. at 713-714.
[541] Tr. at 715-716; Exhs. ULG-6 at 56 of 203, ULG-13 at 34-36 of 75.
[542] Tr. at 719-720; Exhs. ULG-6 at 67 of 203, ULG-13 at 71 of 75.
[543] Tr. at 720; Exhs. ULG-6 at 68 of 203.
[544] Tr. at 762-763.
[545] Tr. at 774-775; Exh. S-46 at 3, 31 of 184.

cases while in law school.[546] Mr. Freeman testified that after law school he worked a little over two years at a law firm, where his practice included securities matters, before he became a fellow at the University of Pennsylvania's Center for Study of Financial Institutions, where he wrote legal articles and took two classes including one on securities regulation.[547] Mr. Freeman testified that he then taught law at the University of South Carolina for 35 years, including over 30 years teaching both securities regulation and professional responsibility, and over 12 years teaching white collar crime.[548] Mr. Freeman testified that he received several awards and published numerous articles while teaching at the University of South Carolina.[549] Mr. Freeman testified that he became a full professor at the University of South Carolina and was the John Campbell Chair of Business and Professional Ethics before he retired, as the John Campbell Professor of Business and Professional Ethics Emeritus and a Distinguished Professor Emeritus.[550] Mr. Freeman testified that he has testified on behalf of the South Carolina Attorney General's Office in securities prosecutions.[551] Mr. Freeman testified that he worked at the SEC to drive mutual fund sales.[552] Mr. Freeman testified that he worked with the Securities Division for the state of South Carolina, and that he has testified before Congress on mutual fund issues and before the South Carolina legislature on changes to that state's securities act.[553] Mr. Freeman testified that he has taught approximately 100 different CLE courses to attorneys as well as CLE courses for judges.[554]

Mr. Freeman testified that he has been involved in lawyer misconduct cases by defending attorneys and working with the South Carolina Office of Disciplinary Counsel.[555] Mr. Freeman testified that he has testified as an expert in federal and state courts and arbitrations, regarding duties owed by lawyers in securities offerings and materially misleading private placement memoranda, without ever having been found unqualified to testify.[556]

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[546] Tr. at 776-779, 796.
[547] Tr. at 779-781, 795; Exh. S-46 at 3, 31 of 184.
[548] Tr. at 781-787, 790-791, 796; Exh. S-46 at 3, 31-32 of 184.
[549] Tr. at 783, 792-793; Exh. S-46 at 32-34 of 184.
[550] Tr. at 782-783; Exh. S-46 at 2, 31 of 184.
[551] Tr. at 785; Exh. S-46 at 3 of 184.
[552] Tr. at 788-789; Exh. S-46 at 3, 31 of 184.
[553] Tr. at 789-790; Exh. S-46 at 3-4 of 184.
[554] Tr. at 791, 794; Exh. S-46 at 3, 34-36 of 184.
[555] Tr. at 792.
[556] Tr. at 793-796, 798.

Mr. Freeman testified that the facts and data he reviewed in this case are standard for an expert for offering an opinion on the conduct of professional participants regarding the standard of care and breaches thereof, which would be facts not legal opinions.[557] The Division tendered Mr. Freeman as an expert witness:

> [1.] [I]n the fields of the standard of care of conduct required of South Carolina lawyers and the responsibilities owed by lawyers and others who are involved in and assist in efforts to offer and [sell] securities to investors … [2.] an expert on the duties owed by lawyers faced with conflicts of interest in undertaking tasks they are asked to perform … [and 3.] an expert regarding the breach … by Respondents [ULG] and Candy Kern-Fuller of the applicable standards of professional conduct and the consequences of those breaches.[558]

The ALJ found Mr. Freeman qualified as an expert.[559]

Mr. Freeman testified that he first learned about the income stream investments when he was contacted by two attorneys regarding litigation in South Carolina federal court involving whether veterans had been abused by BAIC, VFG, SoBell, Mr. Gamber, Mr. Corbett, Ms. Kern-Fuller, ULG, and others.[560] Mr. Freeman testified that subsequently he was contacted by the Division regarding the same type of transactions and the same players.[561] Mr. Freeman testified that his research uncovered some veterans' cases in federal courts that started as collection matters before counter-claims and third-party claims were raised against individuals and entities involved in these litigated transactions, including ULG and Ms. Kern-Fuller.[562]

Mr. Freeman testified that if the Commission finds that the transactions at issue in this case involve the unlawful sale or purchase of a security, his opinion is that Ms. Kern-Fuller and ULG participated in the purchase or sale.[563] Mr. Freeman testified that the Escrow Services and Fee

[557] Tr. at 797, 800.
[558] Tr. at 801.
[559] Tr. at 802.
[560] Tr. at 803-805.
[561] Tr. at 805-806.
[562] Tr. at 806-808.
[563] Tr. at 809-810.

Agreement document established ULG as an escrow agent in these transactions with ULG having a fiduciary relationship with both the veterans and the investors.[564] Mr. Freeman testified that an escrow account in South Carolina carries "lots of requirements" for recordkeeping and that he agreed with Mr. Woerner's testimony that ULG, as the escrow agent, would be the best source of information about the payments received by investors.[565] Mr. Freeman testified that he believed ULG did not properly maintain the escrow account records because ULG should possess meticulous records about monies coming out of the account, as required by South Carolina law, yet what happened to monies is disputed.[566] Mr. Freeman testified that he has not seen ULG's escrow account information, but that he was testifying based on what ULG should have and the fact that the information had not been produced.[567] Mr. Freeman testified that "when you're running the books and when you're handling the money, you're a participant in my estimation."[568] Mr. Freeman testified that buyers would need to sign the agreement before, or at least during the closing, which hints that ULG was representing buyers during the transaction.[569] Mr. Freeman testified that ULG's Legal Services and Fee Agreement used with distributors stated that ULG is not giving securities advice, meanwhile the sales literature given to investors makes no mention of securities at all, which is "a big question" for these transactions.[570] Mr. Freeman testified that the Escrow Services and Fee Agreement stated that the attorney may withdraw at any time with reasonable notice given, indicating that representation began when the document was signed with no reason to believe the representation ever ended as Mr. Freeman had not seen any document ending the relationship.[571] Mr. Freeman testified that the Escrow Services and Fee Agreement states that the buyer's assignment of fees to ULG is irrevocable and enforceable against any rights the buyer has to monies to be paid to the buyer, giving ULG an active financial interest in the payouts which would constitute ongoing participation by ULG.[572] Mr. Freeman testified that the Escrow Services and Fee Agreement contains a provision giving the client/buyer a right to terminate

[564] Tr. at 810-811; Exh. ULG-76.
[565] Tr. at 811-813.
[566] Tr. at 861-862.
[567] Tr. at 862.
[568] Tr. at 813.
[569] Tr. at 813-814.
[570] Tr. at 814, 823-824; Exh. ULG-75 at 2 of 9.
[571] Tr. at 814-815; Exh. ULG-76 at 2-3 of 4.
[572] Tr. at 815; Exh. ULG-76 at 3 of 4.

the agreement but since Mr. Freeman did not know of any such terminations, the representations would be ongoing and demonstrate participation.[573] Mr. Freeman testified that investment literature stated that ULG provided a credit report and a Nexis search report on the seller and provided a transaction summary to the buyer and SMI before closing, which contradicts ULG's assertion that they don't represent the buyer before closing.[574]

Mr. Freeman testified that the Legal Services and Fee Agreement adds another client, the distributor, to the same transaction, and he questioned how the agreement can state that ULG represents only the distributor when the buyer is also represented in the Escrow Services and Fee Agreement.[575] The Legal Services and Fee Agreement stated that "[f]ees shall be paid to [ULG] when the transaction is 'closed' by the law firm, … [i.e. when] all documents are complete and the law firm has approved the sale for funding and funding is transmitted to the seller, client[,] and buyer by [ULG]."[576] Mr. Freeman testified that for the closing to be complete in an investment transaction, full and fair disclosure of all material facts needs to have been made, but he was not aware of any evidence that all material facts for these transactions had actually been disclosed.[577] The Legal Services and Fee Agreement stated that representation of the distributor ended at closing, but Mr. Freeman testified that he believed there was an ongoing representation of the distributor because: ULG picks out sellers by verifying the eligibility of people for the distributor to participate in the transactions; ULG reviews and edits sales literature; ULG meets repeatedly with Mr. Gamber and gives him sales advice; and ULG was playing an active role on an ongoing basis as part of this investment scheme.[578] Mr. Freeman testified that investment literature stated that ULG is contracted by SMI to provide legal services for the exclusive benefit of the buyer and SMI without any mention of beginning or ending of the representation, which Mr. Freeman testified is a problem because a lawyer cannot exclusively represent people with potential conflicts of interest without disclosing the conflict and obtaining written waivers.[579] In his written opinion (the "Freeman Report"), which is part of the evidence of record, Mr.

[573] Tr. at 815-816; Exh. ULG-76 at 3 of 4.
[574] Tr. at 822; Exh. S-46 at 9 of 184.
[575] Tr. at 817-818; Exh. ULG-75 at 1 of 9.
[576] Exh. ULG-75 at 1 of 9.
[577] Tr. at 818, 822-823.
[578] Tr. at 819; Exh. ULG-75 at 1 of 9.
[579] Tr. at 820-821, 826-827; Exh. S-46 at 9 of 184.

Freeman found that Ms. Kern-Fuller violated South Carolina Ethical Rules 1.7 and 1.8 regarding conflict of interest.[580] Mr. Freeman testified that ongoing representation of the distributor is evidenced by the Legal Services and Fee Agreement, as in the Escrow Services and Fee Agreement, combined with a lack of any withdrawals of representation or termination of representation by the client.[581]

Mr. Freeman testified that ULG and Ms. Kern-Fuller participated in the transactions as they had "a say-so" in the documents provided to investors and prepared Word documents that were revised by Ms. Plant and placed in the sales literature.[582]

Mr. Freeman testified that ULG's participation is also evidenced in the sales literature which states that ULG prepares and files a UCC-1 to "Perfect" the buyer's security, and ULG ensures all documentation is complete, which according to Mr. Freeman, would require reading it, reviewing it, thinking about it, and ensuring it meets the appropriate standards of disclosure.[583] Mr. Freeman testified that the Legal Services and Fee Agreement, like the Escrow Services and Fee Agreement, provided for an assignment of monies, demonstrating an ownership interest by ULG in the finances of the transaction.[584] Mr. Freeman testified that ULG was a participant by suing the defaulting veterans on behalf of PAC, which would seem to create a conflict of interest as ULG is a fiduciary escrow manager for the veteran.[585] Mr. Freeman testified that ULG and Ms. Kern-Fuller could further be brought into the lawsuit as a third party defendant, which happened in one case.[586] Mr. Freeman testified that ULG was "representing everybody and pushing the money around and being the central banker, and … approving things like sales literature" without ever taking "a hard look at the fact that this may be a scam and [ULG] may be actively participating in the scam."[587] On cross-examination, Mr. Freeman acknowledged that an escrow agent in a real estate transaction does not necessarily represent all parties to the transaction.[588]

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[580] Exh. S-46 at 8 of 184.
[581] Tr. at 824; Exh. ULG-75 at 2-3 of 9.
[582] Tr. at 821-822.
[583] Tr. at 822; Exh. S-46 at 9 of 184.
[584] Tr. at 824-825.
[585] Tr. at 825.
[586] Tr. at 826.
[587] Tr. at 826, 859.
[588] Tr. at 859-860.

Mr. Freeman testified that he believed Ms. Kern-Fuller acted outside the ordinary course of her professional capacity as a South Carolina licensed lawyer in connection with the sales or purchases of the investments at issue.[589] Mr. Freeman testified that one can act as an attorney but not act properly within the ordinary course of business as an attorney because lawyers are forbidden to engage in fraud or deception.[590] Mr. Freeman testified that Ms. Kern-Fuller committed multiple violations of the South Carolina Rules of Professional Conduct, as follows.

Rule 1.2(d) of the South Carolina Rules of Professional Conduct provides, in pertinent part, that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Mr. Freeman testified that Ms. Kern-Fuller and ULG violated this rule as there were "very strong indications" that these transactions were illegal and it has been an ongoing problem with the actions in several states.[591] When asked his opinion about the possibility that the Respondents did not know about the orders, Mr. Freeman testified that "if it's your job to be the central banker for a business enterprise that is raking in millions of dollars … you are on the notice from the get-go that … the legal issues here are many, they're serious, and they need to be carefully thought through" and you need to exercise due diligence for how the transaction works and who the people are that are involved.[592] Mr. Freeman testified that a memorandum from an Arkansas law firm ["Arkansas Memorandum"], dated September 26, 2011, allegedly green lights the transactions for VFG, but Mr. Freeman notes that the memorandum states it is "not a legal opinion."[593] Mr. Freeman testified that an attorney must "keep your eyes open" and failure to disclose the state orders, which came after the Arkansas Memorandum and posed an obvious risk to investors, constitutes an unlawful concealing of material facts.[594]

Mr. Freeman testified that Ms. Kern-Fuller violated ethical rule 1.3, duty of diligence, as he saw no signs that sufficient diligence was done to prepare disclosure documentation, which results in harm to buyers.[595] Mr. Freeman testified that Ms. Kern-Fuller violated ethical rule 1.4, duty to give

[589] Tr. at 827, 860; Exh. S-46 at 6-28 of 184.
[590] Tr. at 860-861.
[591] Tr. at 828-829.
[592] Tr. at 829.
[593] Tr. at 830-831; Exh. ULG-81 at 1 of 8.
[594] Tr. at 832.
[595] Tr. at 832-833; Exh. S-46 at 8 of 184.

information, as buyers received assurances that ULG ensured that all documentation is complete and ULG kept buyers' moneys in a lawyer's IOLTA trust account while the lawyers were also working for the distributor but not disclosing all the facts.[596]

Mr. Freeman testified that Ms. Kern-Fuller violated ethical rule 1.16, duty to decline or withdraw from representation if the representation will violate the Rules of Professional Conduct or other law.[597]

Mr. Freeman testified that Ms. Kern-Fuller violated ethical rule 8.4, a "catchall" provision that includes misrepresentation, because "there's a lot of misrepresentation in the way these things were handled, and omissions to state material facts."[598]

Mr. Freeman testified that, contrary to the sales literature, ULG was not independent counsel as they were part of the sales group, they represented multiple parties, they had a vested interest in sales, and they helped target the best veterans to participate.[599]

Mr. Freeman testified that Section 10.2 of the Acknowledgement of Risk provision in the Contract for Sale of Payments was inadequate.[600] Mr. Freeman testified that the language in this section omits to state material facts and has been found misleading by other states.[601] Mr. Freeman testified that the intentions of the parties do not trump the law and that there is reason to believe that Federal Anti-Assignment Acts prohibit these transactions regardless of the parties' wishes.[602] Mr. Freeman testified that an attorney for ULG stated in federal court that the buyer does not have any enforceable rights, which is a risk not disclosed. Mr. Freeman testified that it was also not disclosed that "you're dealing with disreputable people, or at least people of very potentially disreputable backgrounds."[603] Mr. Freeman testified that the disclosures are "not forthcoming" and "material facts are concealed."[604]

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[596] Tr. at 833; Exh. S-46 at 8 of 184.
[597] Tr. at 834; Exh. S-46 at 8 of 184.
[598] Tr. at 834; Exh. S-46 at 7-8 of 184.
[599] Tr. at 834-835.
[600] Tr. at 836. Section 10.2 reads:

> Both parties intend that the transaction(s) contemplated by this Contract for Sale shall constitute valid sale(s) of payments and shall not constitute impermissible assignment(s), transfer(s), or alienation of benefits by sellers as contemplated by applicable laws; however, certain risks persist.

Exh. S-116 at ACC001496.
[601] Tr. at 837.
[602] Tr. at 837.
[603] Tr. at 838.
[604] Tr. at 838.

A disclosure of risks statement in the closing book, under the heading of Restrictions on Assignability/Collectability, read:

> The nature of the Contract for Sale of Payments in this transaction is that the Buyer purchases only the payments that the Seller is receiving as an income stream … Consequently, this transaction is a purchase of a contractual right to a payment obligation and not the payment per se.[605]

Mr. Freeman testified that this disclosure is "just gibberish" and that a proper disclosure would include an opinion from a reputable law firm showing that Federal Anti-Assignment Acts do not apply.[606] Mr. Freeman testified that he saw no evidence that Ms. Kern-Fuller or her law firm sought an opinion from a competent securities law firm as to the applicability of the Federal Anti-Assignment Acts to these transactions.[607]

Mr. Freeman testified that he found deception by Ms. Kern-Fuller and ULG on both sides of the transaction: sellers are told in closing documents that they are subject to criminal prosecution if they do not make payments, though they are not advised that the contract is potentially void and unenforceable; buyers are led to believe they have enforceable rights when, pursuant to the statement of ULG's attorney in federal court, they do not.[608] Mr. Freeman testified that he believed the veterans in this case were mistreated and lured into illegal transactions.[609]

The affidavit of the ULG Respondents' expert witness William O. Higgins alleges that the Freeman Report is based on speculative information provided to Mr. Freeman by the Division.[610] Mr. Freeman testified that his opinion is based on factual information that an expert commonly relies upon in cases like these, including: the earlier hearing testimony, gathering information on PACER[611] and the South Carolina equivalent of PACER, and speaking with lawyers in South Carolina as well as the Division about the underlying facts.[612] Mr. Higgins' affidavit states that "the alleged issue of Ms. Kern-

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[605] Tr. at 839; Exh. S-116 at ACC001511.
[606] Tr. at 839-840.
[607] Tr. at 840.
[608] Tr. at 840-841; Exh. S-46 at 12-14 of 184.
[609] Tr. at 854-855.
[610] Exh. ULG-84 at 4, ¶ 10.
[611] The Public Access to Court Electronic Records (PACER) service provides electronic public access to federal court records.
[612] Tr. at 842-843, 854.

Fuller acting outside of the ordinary course of her professional capacity is not a claim before the Arizona Securities Division and is, therefore, outside of its jurisdiction to decide."[613] Mr. Freeman testified that he does not understand Mr. Higgins to be an expert on jurisdictional issues under Arizona law which is a question for the Commission.[614] Mr. Freeman testified that the question of whether Ms. Kern-Fuller's behavior is normal or aberrational for a South Carolina lawyer is a question of fact on which Mr. Freeman is qualified to give an opinion.[615] Mr. Freeman testified that he understands the Division's case against Ms. Kern-Fuller alleges a) she participated in the transactions and b) to establish liability, the participation has to be aberrational for a professional.[616]

The affidavit of Mr. Higgins states that "I find nothing to indicate that Ms. Kern-Fuller failed to render her legal services in relation to the subject transactions with the degree of skill, care, knowledge, and judgment possessed and exercised by members of her profession."[617] Mr. Freeman testified that he did not believe Mr. Higgins was qualified to render that opinion as Mr. Freeman is not aware of Mr. Higgins ever being qualified as an expert in a securities case.[618] Mr. Freeman testified that based on his background, he is qualified to be an expert here and that Ms. Kern-Fuller's conduct fell below applicable standards based upon nondisclosures about costs, risks, the track record of Mr. Gamber, the Federal Anti-Assignment Acts, and the many state securities proceedings.[619] The affidavit of Mr. Higgins states that "[i]t appears that Ms. Kern-Fuller acquired the "know-how" necessary to handle the matters and to perform her services competently."[620] Mr. Freeman testified that the record does not support Ms. Higgins' assertion as Ms. Kern-Fuller has given legal advice to Mr. Gamber and "the consumer protection people in South Carolina" while taking the position in federal court that she does not have any securities know-how.[621] Mr. Freeman testified that in the South Carolina federal district court case of *Life Funding Options v. Blunt*, involving transactions equivalent to those in this case, Ms. Kern-Fuller argued that the RICO claims against her are barred because the conduct amounts

[613] Exh. ULG-84 at 5.
[614] Tr. at 843.
[615] Tr. at 843.
[616] Tr. at 844.
[617] Tr. at 844.
[618] Tr. at 844.
[619] Tr. at 845, 860.
[620] Exh. ULG-84 at 6.
[621] Tr. at 846.

to securities fraud and securities cases cannot be brought under RICO.[622] Mr. Freeman testified that BAIC stands for Buyers Annuities and Investment Contracts Company, making it "pretty brazen" to have investment contracts in your name and then argue that securities laws don't apply to these transactions.[623]

On cross-examination, Mr. Freeman testified that while on one level this is a securities case, the Commission will also need to decide whether there was wrongdoing, whether Ms. Kern-Fuller was a participant in the wrongdoing, and whether Ms. Kern-Fuller's participation takes her outside of the statutory safe harbor, the latter issue being largely the reason for Mr. Freeman's testimony.[624]

Mr. Freeman testified that while Mr. Smith and Mr. DeSimone testified that they did not receive any sales materials from ULG or Ms. Kern-Fuller, Mr. Freeman took their testimony to mean that they did not directly communicate with ULG or Ms. Kern-Fuller, but to the extent that Ms. Kern-Fuller was involved in drafting closing documents and sales literature, they would have received disclosures from her without even realizing it.[625]

Mr. Freeman testified that, to his knowledge, not a single court has litigated the merits of Mr. Gamber's transactions.[626]

Mr. Freeman testified that his written report was his opinion at the time, with subsequent information buttressing, amplifying and expanding his opinions.[627] Mr. Freeman testified that the Freeman Report was based on facts provided by the Division that he believed would be put into evidence.[628] Mr. Freeman testified that he was aware of court cases that upheld certain arrangements as not violating anti-assignment laws but he "did not study them in light of the wealth of material, with which [he] agreed, holding the contrary."[629] Mr. Freeman testified that in reaching his opinion that Ms. Kern-Fuller knowingly violated various provisions of the South Carolina Rules of Professional Conduct, he assumed the transactions involved wrongful, fraudulent schemes.[630]

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[622] Tr. at 847.
[623] Tr. at 847-848.
[624] Tr. at 856-857.
[625] Tr. at 856-858.
[626] Tr. at 861.
[627] Tr. at 862-863.
[628] Tr. at 863; Exh. S-46 at 5 of 184.
[629] Tr. at 864-865.
[630] Tr. at 866; Exh. S-46 at 7 of 184.

On cross-examination, Mr. Freeman disputed the contention that he lacked information that ULG and Ms. Kern-Fuller possessed actual knowledge of fraudulent schemes by the distributor because of conduct "in the face of grave questions as to illegality … conduct that results in … obvious deception to investors," and the ethical rules that provide "a person's knowledge may be inferred from the circumstances."[631] Mr. Freeman further testified that under securities law, reckless conduct suffices for scienter in fraud cases.[632] Mr. Freeman testified that reckless conduct may be defined as a highly unreasonable omission or a misrepresentation involving an extreme departure from the standards of ordinary care and which presents a danger of misleading buyers or sellers that is either known or is so obvious that the actor must have been aware of it.[633] Mr. Freeman testified that there was an extreme departure from the standards of ordinary care in this case because buyers and sellers did not get full and fair disclosure of material facts including: Federal Anti-Assignment Acts; that various states found these transactions to be illegal; and the involvement of Mr. Gamber, who had "a malignant history as a securities con artist … to the point where he … gets fired or thrown out by participants in this scheme for defrauding them."[634] Mr. Freeman testified that all of these issues were "obvious to anybody who really looks at the facts [a]nd Ms. Kern-Fuller was obviously involved intimately" such that Ms. Kern-Fuller knew or obviously had to be aware of misleading buyers and, therefore, acted knowingly.[635]

Mr. Freeman testified that at the time of the Freeman Report, he found Ms. Kern-Fuller's role in finalizing the offering documents to be unclear, but since that time it has become clear that she was involved: she sent offering documents to Ms. Plant who would then put them in final PDF format; "[s]he has her fingerprints on the … qualifying of investors;" and she advised Mr. Gamber, including securities advice.[636] Mr. Freeman acknowledged that his opinion on Ms. Kern-Fuller finalizing the offering documents is from information from the testimony under oath of other defendants or other parties against whom fraudulent accusations have been made.[637]

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[631] Tr. at 867.
[632] Tr. at 867; Exh. S-46 at 25-26 of 184, FN 3.
[633] Tr. at 867-868; Exh. S-46 at 25-26 of 184, FN 3.
[634] Tr. at 868.
[635] Tr. at 868-869.
[636] Tr. at 869-870; Exh. S-46 at 9 of 184.
[637] Tr. at 870-871.

Mr. Freeman acknowledged that on page 10 of the Freeman Report he found it unclear whether Ms. "Kern-Fuller or ULG originated, reviewed, authorized, approved, or ratified" statements of material fact in materials furnished to investors," while on page 12 he wrote that Ms. Kern-Fuller and ULG "participated in marketing and effectuating" sales of the investment.[638] Mr. Freeman clarified that he meant Ms. Kern-Fuller participated in marketing and effectuating the sales by providing legal services to the buyer and distributor.[639]

On cross-examination, Mr. Freeman testified that if he were to assume that the transactions did not violate any law, he would need to reassess his opinion.[640] Mr. Freeman testified that if he were to assume that the transactions are not securities, which goes against Ms. Kern-Fuller's position in court in South Carolina, then "you still got mail fraud and wire fraud involved[, y]ou've got a RICO type of transaction, you may have common law fraud and a host of other activities that would come to the fore."[641] Mr. Freeman testified that regardless of how the transactions are viewed, "people got cheated; they were misled."[642]

Mr. Freeman testified that the written disclosures in the fulfillment books were not adequate because numerous risks were being concealed from investors.[643] Mr. Freeman testified that the disclosure stating that the seller maintains control of the pension at all times is meaningless because the seller obviously cannot give his pension away, rather the issue is that the payments are being given away.[644] Mr. Freeman testified that he has an issue with ULG participating in transactions where disclosures were never made in the closing documents or the sales literature.[645] Mr. Freeman testified that securities laws are designed to help investors "understand the risks of their investment and make sure they get a fair shake" which did not happen here as investors have testified they would not have invested had they known information that was not disclosed.[646]

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[638] Tr. at 872-874; Exh. S-46 at 10, 12 of 184.
[639] Tr. at 874.
[640] Tr. at 875-876.
[641] Tr. at 876.
[642] Tr. at 876.
[643] Tr. at 877-878.
[644] Tr. at 878.
[645] Tr. at 878.
[646] Tr. at 879.

Mr. Freeman testified that ULG and Ms. Kern-Fuller were not just escrow agents keeping track of the money in these transactions, rather they were "in it up to their eyeballs" because: they vetted the veterans; they are lawyers for Mr. Gamber and communicated with him about the investment; they were involved in drafting the documents that get signed; and the law firm let its name be used in these transactions, let its escrow account be used, and paraded its malpractice carrier as a protector of the investors' investments.[647] When asked if Mr. Freeman would change his opinion regarding the appropriate standard of care if ULG and Ms. Kern-Fuller had not participated in the drafting of the marketing materials, Mr. Freeman testified that, to the contrary, it would be an aggravating factor for a lack of due diligence that a law firm, which is being held out to protect the investors, never even reviewed the sales literature being used for transactions consuming millions of dollars over the course of years.[648]

Mr. Freeman testified that he considers ULG's vetting for eligibility and drafting closing documents to be marketing activities.[649]

William O. Higgins - Expert Witness for the ULG Respondents

Mr. Higgins testified that he has a Bachelor of Science degree in business from South Carolina, a J.D. from the University of South Carolina School of Law, and an LL.M. in taxation from New York University Law School.[650] Mr. Higgins testified that he has been practicing law in South Carolina since May 1985 with primary practice areas of commercial real estate, tax, general corporate and business matters, and legal ethics.[651] Mr. Higgins testified that he has never practiced law in the areas of securities, white collar crime or business crime.[652] Mr. Higgins testified that he is not a securities lawyer and that he is giving no opinion regarding securities in this matter.[653] Mr. Higgins testified that he reviewed the Freeman Report, he was present for Mr. Freeman's opinion testimony, and that Mr. Higgins' testimony is solely in rebuttal of Mr. Freeman's testimony on the standard of care issue.[654]

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[647] Tr. at 879-880.
[648] Tr. at 880-881.
[649] Tr. at 881.
[650] Tr. at 901; Exhs. ULG-82, ULG-84 at 2.
[651] Tr. at 901-902; Exhs. ULG-82, ULG-84 at 2.
[652] Tr. at 929.
[653] Tr. at 901.
[654] Tr. at 902, 906.

Mr. Higgins testified that has served on the South Carolina Bar's Professional Responsibility Committee and the South Carolina Bar's Ethics Advisory Committee for over 20 years and that he has been the former chair of both.[655] Mr. Higgins testified that he also chaired the South Carolina Bar's "Ethics 2000" subcommittee which worked to develop the rules of professional conduct adopted by the South Carolina Supreme Court in 2005.[656] Mr. Higgins testified that he is a member of the South Carolina Association of Ethics Counsel and he speaks annually at their ethics seminar.[657] Mr. Higgins testified that he is a faculty member for the South Carolina Supreme Court's ethics essentials initiative for new lawyers.[658] Mr. Higgins testified that he is a faculty member for the "Ethics School" joint effort with the South Carolina Supreme Court and the South Carolina Bar's Professional Ethics Committee, at which he speaks two or three times a year.[659] Mr. Higgins testified that he has testified between 25 to 30 times in the last 10 years in matters dealing with lawyer conduct, primarily legal malpractice matters.[660] Mr. Higgins testified that his education, training, and experience make him familiar with the skill, care, and knowledge required of lawyers practicing in South Carolina, and he has given opinions on lawyers' standard of care in previous matters.[661] Mr. Higgins testified that the standard of care for lawyers in South Carolina is consistent with the standards in other jurisdictions.[662]

Mr. Higgins testified that he received and reviewed materials from counsel for ULG and Ms. Kern-Fuller, which he used as a basis for an affidavit of his opinions.[663] Respondents ULG and Ms. Kern-Fuller offered Mr. Higgins as an expert witness on the issue of standard of care and as a rebuttal to Mr. Freeman.[664] The ALJ found Mr. Higgins qualified as an expert.[665]

Mr. Higgins testified that he knows Mr. Freeman from having been his student at the University of South Carolina School of Law, from having been involved in the same types of matters, from being on opposite sides in at least one case, and from running in the same professional circles of malpractice

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[655] Tr. at 902-903; Exhs. ULG-82, ULG-84 at 2.
[656] Tr. at 903; Exhs. ULG-82, ULG-84 at 2.
[657] Tr. at 903.
[658] Tr. at 903.
[659] Tr. at 903-904; Exhs. ULG-82, ULG-84 at 2.
[660] Tr. at 904; Exh. ULG-84 at 2.
[661] Tr. at 904; Exh. ULG-84 at 3.
[662] Tr. at 904-905.
[663] Tr. at 905, 907-908; Exh. ULG-84.
[664] Tr. at 905-906.
[665] Tr. at 906.

expert work.[666] Mr. Higgins testified that he understands Mr. Freeman to be an expert in securities related matters and the rules of professional conduct for attorneys in South Carolina, but not an expert in litigation or Arizona law.[667] Mr. Higgins testified that he has the utmost respect for Mr. Freeman, but he believes that the Amended Notice does not go to issues of professional responsibility of ULG and Ms. Kern-Fuller and, therefore, Mr. Freeman's opinion addresses "issues that are irrelevant or, at best, only tangentially relevant."[668] Mr. Higgins testified that his opinion on the relevance of Mr. Freeman's opinion has not changed after hearing Mr. Freeman's testimony.[669] Mr. Higgins testified that Mr. Freeman's report was based upon information given to Mr. Freeman by the Division's counsel, who asked Mr. Freeman to assume information that counsel intended to present at hearing, with this information "solidified" for Mr. Freeman by his attendance at the early part of the hearing.[670]

Mr. Higgins noted that Mr. Freeman's testimony referred to pending actions in South Carolina, for which Mr. Higgins did not know if confidentiality orders were in place, but for which he would be surprised if there was not.[671] Mr. Higgins testified that the point of a confidentiality order in a federal court matter in South Carolina would be to keep that information within the confines of that particular court matter, and, based on his experiences as an expert, confidentiality orders continue after the case is concluded.[672] Mr. Higgins testified that subsequent to his affidavit, he was provided a copy of a confidentiality order from an action in the Greenville South Carolina District Court, *Lyons, et. al. v. BAIC, Inc., et al.*[673] Mr. Higgins testified that he is not familiar with the status of *Lyons* and he has not used PACER to check the status.[674] Mr. Higgins testified that he has not looked into South Carolina federal district court cases online to check the status of *McFerren,* involving income stream investments and veterans, or to check documents or the docket in *Blunt,* involving the sale of veterans' benefits.[675]

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[666] Tr. at 507.
[667] Tr. at 1107-1108.
[668] Tr. at 908-909; Exh. ULG-84 at 4.
[669] Tr. at 909.
[670] Tr. at 910; Exh. ULG-84 at 4-5.
[671] Tr. at 910-911.
[672] Tr. at 911, 1023-1024.
[673] Tr, at 936-938.
[674] Tr. at 938.
[675] Tr. 938-939.

Mr. Higgins testified that Mr. Freeman's report is conclusory as Mr. Freeman's opinions assume fundamental legal conclusions, not just facts, by assuming that the transactions in question are securities and/or that they violate Federal Anti-Assignment Acts.[676] Mr. Higgins testified that Mr. Freeman's report relied upon marketing materials that Mr. Freeman presumed Ms. Kern-Fuller had a role in, while Mr. Higgins contended that problems in the disclosures cannot reasonably be attributed to Ms. Kern-Fuller absent proof of her participation in them.[677] Mr. Higgins testified that he believed Mr. Freeman's opinions were predetermined conclusions with Mr. Freeman looking for inculpatory evidence against ULG.[678] Mr. Higgins testified that he did not believe Mr. Freeman investigated both sides of the issue thoroughly with an open mind.[679] Mr. Higgins testified that he approached this matter the same as he always does when asked to serve as an expert: by reviewing the materials to independently reach an opinion that may not always be satisfactory to the folks who want to hire him.[680]

Mr. Higgins concluded that Ms. Kern-Fuller did not act outside the scope of her professional capacity as a lawyer licensed in South Carolina regarding the transactions involving the purchase of income streams.[681] Mr. Higgins believed that Ms. Kern-Fuller represented the buyers in closing the transactions or documenting them and she also served as the escrow agent for the funds associated with the transactions.[682] Mr. Higgins testified that he disagrees with Mr. Freeman's opinion that a South Carolina transactional lawyer "who is asked to close a transaction is somehow subject to being responsible for every transactional document that gave rise to the transaction in the first place."[683] Mr. Higgins testified that he believed Ms. Kern-Fuller's role was to close the transaction after it had already been agreed to by the buyer and the seller, with help from a distributor for whom Ms. Kern-Fuller also did some work.[684] Mr. Higgins believed that an opinion on the standard of care for a transactional lawyer is not relevant in this proceeding.[685] Mr. Higgins testified that the Amended Notice did not

[676] Tr. at 912-913.
[677] Tr. at 913-914, 967-968; Exh. ULG-84 at 5.
[678] Tr. at 914.
[679] Tr. at 923.
[680] Tr. at 924.
[681] Tr. at 915-916; Exh. ULG-84 at 5.
[682] Tr. at 915, 1006.
[683] Tr. at 915.
[684] Tr. at 915-916.
[685] Tr. at 916.

allege Ms. Kern-Fuller or ULG acted outside the ordinary course of their professional capacity and, since it appears that Ms. Kern-Fuller was not asserting a professional capacity defense, that he believed the purpose of Mr. Freeman's opinion "was frankly designed to just make Ms. Kern-Fuller and [ULG] look bad."[686] Mr. Higgins testified that he found no evidence that ULG or Ms. Kern-Fuller failed to meet the standard of care required for providing escrow services and closing services to the buyers/investors.[687] Mr. Higgins testified that his review of documents, including responsive letters by Ms. Kern-Fuller to the South Carolina Office of Disciplinary Counsel and the South Carolina Department of Consumer Affairs, demonstrate that Ms. Kern-Fuller conducted due diligence, but a transactional lawyer is not responsible for all of the documents that other people may have prepared in connection with the transaction.[688] Mr. Higgins noted that Ms. Kern-Fuller wrote in a letter to South Carolina Office of Disciplinary Counsel that the income streams are not securities and they do not meet the factors of the *Howey* test, a statement that Mr. Higgins believed was not a misrepresentation.[689] Mr. Higgins testified that since the SEC's bulletin on the income stream transactions did not call them securities or declare they violate federal anti-assignment law, a lawyer could reasonably conclude that there is some question about those characterizations.[690] On cross-examination, Mr. Higgins acknowledged that the SEC bulletin warned investors that these type of transactions may or may not be securities, but Mr. Higgins believed if the SEC was confident the transactions were securities they would have said.[691] Mr. Higgins testified that the Arkansas Memorandum, upon which Ms. Kern-Fuller relied, is "something typical" for a transactional attorney to consider when seeking to gain a general understanding of a transaction, and that Ms. Kern-Fuller's reliance thereon was reasonable.[692] Mr. Higgins testified that he has seen nothing in the record that would suggest the conclusions of the Arkansas Memorandum are not still applicable today.[693] Mr. Higgins testified that his opinions are within a reasonable degree of certainty.[694]

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[686] Tr. at 917.
[687] Tr. at 917.
[688] Tr. at 917; Exhs. ULG-79, ULG-80.
[689] Tr. at 918-919, 952-953, 1015; Exh. ULG-79 at 4.
[690] Tr. at 919-920.
[691] Tr. at 1012.
[692] Tr. at 920-922; Exh. ULG-81.
[693] Tr. at 922; Exh. ULG-81.
[694] Tr. at 922-923.

On cross-examination, Mr. Higgins acknowledged that he had not testified in a trial or hearing within the past four years, though he has given deposition testimony.[695] Mr. Higgins testified that he has only published one article in the last ten years, which was in November 2009.[696] Mr. Higgins testified that he has never taught law school courses in: professional responsibility, legal ethics, securities, white collar crime, or business crime, though he "substituted for a couple of classes at the University of South Carolina School of Law in professional responsibility."[697] Mr. Higgins testified that has never taught or lectured on, or practiced in the area of the standards of conduct and the duties owed by lawyers and securities professionals in the marketing and sale of securities.[698] Mr. Higgins testified that he has never worked for or with securities regulators, or with legislative bodies about securities matters.[699] Mr. Higgins testified that he is neither familiar with, nor qualified to opine on, the standards of conduct applicable to securities professionals.[700] Mr. Higgins testified that he is not qualified to opine on the duties owed by lawyers who advise clients on the issuance and sale of securities, though he is qualified with respect to transactional lawyers.[701] Mr. Higgins testified that he has never testified before the United States Congress, nor has he testified before the South Carolina legislature on issues pertinent to this case.[702] Mr. Higgins testified that he has never litigated lawyer misconduct or securities matters in court.[703] Mr. Higgins testified that he has never brought a securities claim or a legal malpractice claim for a client.[704] Mr. Higgins testified that he is not an expert in litigation, the rules of evidence, securities and investments, Arizona law, or the Arizona Securities Act, the latter of which he has never read.[705] Mr. Higgins testified that he does not know the elements of, or defenses to, a securities fraud claim under the Act other than what he has called the professional capacity defense that he gathered from reviewing documents for this case.[706] Mr. Higgins testified that

[695] Tr. at 927-928.
[696] Tr. at 928.
[697] Tr. at 928-929.
[698] Tr. at 929-930.
[699] Tr. at 930.
[700] Tr. at 930-931.
[701] Tr. at 931.
[702] Tr. at 931-932.
[703] Tr. at 932.
[704] Tr. at 932.
[705] Tr. at 932-933, 1107.
[706] Tr. at 933.

he does not know whether Arizona appellate courts have ruled regarding duties of due diligence for investors, contributory negligence or comparative fault under the Act.[707] Mr. Higgins testified that he is not an expert on jurisdiction of the Commission and that he has never read the Commission's Rules of Practice and Procedure, nor those portions of the Arizona Constitution and A.R.S. regarding the Commission's jurisdiction.[708]

Mr. Higgins testified that his affidavit was a "collaborative effort" with the majority of the words being his and not those of the Manning & Kass law firm upon whose pleading paper the affidavit appears.[709] Mr. Higgins testified that the portion of his affidavit stating "the alleged issue of Ms. Kern-Fuller acting outside of the ordinary course of her professional capacity is not a claim before the Arizona Securities Division, and is, therefore, outside of its jurisdiction to decide," was language originated by the Manning & Kass law firm.[710] Mr. Higgins testified that he reviewed and approved the affidavit.[711] Mr. Higgins testified that his affidavit was accurate when he signed it and that it remained accurate, with his opinions unchanged, when he testified at the hearing.[712] Mr. Higgins testified that in drafting his affidavit, and thereafter, he had not reviewed several documents used by Mr. Freeman in his report, including: a "Structured Income Assets" presentation; a "Structured Assets Buyer's Guide;" cease and desist orders from April 2013 onward by securities regulators in Arkansas, Iowa, New Mexico, Pennsylvania, Florida, and California against VFG; more recent cease and desist orders issued by securities enforcement agencies in Texas and Mississippi; pleadings and other materials available online from civil cases involving Ms. Kern-Fuller and ULG, other than a confidentiality order in the Lyons case.[713] Mr. Higgins testified that he reviewed a copy of Mr. Freeman's report which did not include Mr. Freeman's exhibits attached and, in spite of those exhibits being referenced in the report, Mr. Higgins did not request to review them.[714] Mr. Higgins testified that he did not hear the testimony of any hearing witnesses other than Mr. Freeman, he did not request

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[707] Tr. at 933-934.
[708] Tr. at 935-936.
[709] Tr. at 939, 1117; Exh. ULG-84.
[710] Tr. at 1117; Exh. ULG-84 at 5.
[711] Tr. at 1126.
[712] Tr. at 940-941, 946.
[713] Tr. at 942-945; Exh. S-46 at 5-6 of 184.
[714] Tr. at 946-947.

a transcript of the witness testimony, he did not request to know which witnesses testified, he had not spoken with Ms. Kern-Fuller about the case, and he had not been briefed about the evidence at hearing by anyone at the law firm representing Ms. Kern-Fuller and ULG.[715]

Mr. Higgins testified that he did not know who corporate counsel was for LFO or PAC, and he did not know whether ULG had competence to give securities advice as to whether a transaction involves the sale of a security.[716] Mr. Higgins testified that he was not aware of Ms. Kern-Fuller or ULG having obtained written conflict waivers concerning the legal work of, or parties involved in, these transactions.[717] Mr. Higgins acknowledged that a lawyer working for the exclusive benefit of two parties who have actual or potential conflicting interests in the same transactions "would seem to be inconsistent."[718]

Mr. Higgins testified that he does not know the test of an investment contract under federal or Arizona law.[719] Mr. Higgins testified that he did not know why SunTrust Bank stopped serving as the bank processing ULG's escrow accounts in these transactions.[720] Mr. Higgins testified that South Carolina requires attorneys to obtain written waivers of informed consent when there is a conflict.[721] Mr. Higgins testified that under South Carolina Rule of Professional Conduct 1.7, a written waiver would not be necessary if there is not a significant risk of a material limitation of the attorney's representation.[722]

Mr. Higgins testified that he gave some weight to Ms. Kern-Fuller and ULG's denial of the Division's allegations in its letter requesting an expert opinion from Mr. Freeman.[723]

Among the documents Mr. Higgins reviewed in preparing his affidavit was a spreadsheet Summary of Accounts for BAIC.[724] Mr. Higgins testified that he was not aware that some of the investments listed in this Summary of Accounts for BAIC were not at issue in this case.[725] Another

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[715] Tr. at 950-951.
[716] Tr. at 951-952.
[717] Tr. at 953.
[718] Tr. at 953-954.
[719] Tr. at 953.
[720] Tr. at 953.
[721] Tr. at 954-955.
[722] Tr. at 1021-1022.
[723] Tr. at 958.
[724] Tr. at 957; Exhs. ULG-73, ULG-84 at 4.
[725] Tr. at 959-960.

document Mr. Higgins reviewed in preparing his affidavit was a spreadsheet Summary of Accounts for PAC.[726] Mr. Higgins testified that he was not aware that some of the investments listed in this Summary of Accounts for PAC were not at issue in this case.[727] Mr. Higgins testified that these two spreadsheets did not impact his opinion.[728] Another document reviewed by Mr. Higgins was a Buyer's Escrow Services and Fee Agreement.[729] When shown that the Escrow Services and Fee Agreement states that "This agreement applies only to the attorney's Escrow Services listed above and does not involve the closing of the transaction," Mr. Higgins testified that he "apparently reviewed other information that led [him] to believe that [Ms. Kern-Fuller] also represented the buyers in the closing of the transaction," though Mr. Higgins could not recall what other documents led him to that opinion.[730]

On cross-examination, when Mr. Higgins was confronted by Ms. Plant's testimony before the United States Bureau of Consumer Financial Protection that ULG and Ms. Kern-Fuller made changes to disclosure documents, Mr. Higgins testified that a transactional lawyer who was involved in the preparation of documents would have some responsibility for those documents, but Mr. Higgins is not competent to opine on a standard of care for securities lawyers in the preparation of securities offerings and he minimizes the testimony of Ms. Plant as it represents one person's statement.[731] Mr. Higgins testified that based on the materials he reviewed, including Ms. Plant's testimony, he is not able to make a determination to what extent ULG provided advice or counsel regarding the disclosures for these transactions.[732]

Mr. Higgins opined that the issue of whether Ms. Kern-Fuller acted outside the ordinary course of her professional capacity is outside the Commission's jurisdiction primarily because that allegation is not in the Notice or the Amended Notice.[733] Mr. Higgins testified that he did not know whether an issue can be within the jurisdiction of the Commission if it is not alleged in a notice of opportunity for

[726] Tr. at 957; Exhs. ULG-9, ULG-84 at 4.
[727] Tr. at 960-962.
[728] Tr. at 964.
[729] Exhs. ULG-76, ULG-84 at 3.
[730] Tr. at 966-967.
[731] Tr. at 968-977; Exh. S-195a at ACC000288-ACC000292.
[732] Tr. at 1022.
[733] Tr. at 977-978; Exh. ULG-84 at 5.

hearing and that he would assume the issue would become relevant if raised as an affirmative defense by a respondent.[734] Mr. Higgins testified that based upon conversations with counsel for Ms. Kern-Fuller, and a review of the Answer and a draft of the Amended Answer, he understood Ms. Kern-Fuller and ULG rely primarily on the transactions not being securities and that a professional capacity defense was being relied upon "to a very minor extent."[735] Mr. Higgins testified that the professional capacity defense is not mentioned in Ms. Kern-Fuller's Answer or in the draft of the Amended Answer and he has not reviewed the Amended Answer as filed.[736] Mr. Higgins acknowledged that jurisdiction is a question of law for the ALJ and the Commission to decide, and that he is not qualified to opine as to what issues are within the Commission's jurisdiction.[737]

Mr. Higgins stated in his Affidavit that he found the Freeman Report to be largely irrelevant and Mr. Freeman's conclusions regarding Ms. Kern-Fuller acting outside her professional capacity to be irrelevant to the subject matter of this proceeding.[738] Mr. Higgins acknowledged that he is not an expert on the rules of evidence, which govern the issue of relevancy, and that whether a fact or issue is relevant to the proceeding is a decision for the ALJ and the Commission.[739]

When asked if he disputed Mr. Freeman's opinion that Ms. Kern-Fuller and ULG participated in the income stream transactions, Mr. Higgins testified that he was not sure if "participated" was a term of art, but Mr. Higgins acknowledged that Ms. Kern-Fuller and ULG "certainly were involved in the transaction."[740]

Mr. Higgins, in his Affidavit, concluded that Ms. Kern-Fuller did not act outside the course of her professional capacity regarding the income stream transactions whereas the Freeman Report stated that Ms. Kern-Fuller did not act in the ordinary course of her professional capacity as her conduct violated South Carolina's rules of professional conduct for attorneys.[741] Mr. Higgins testified that he believed an attorney could violate South Carolina's rules of professional conduct and still be within the

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[734] Tr. at 978-979.
[735] Tr. at 979-980; Exh. ULG-84 at 5.
[736] Tr. at 981-983.
[737] Tr. at 987-988.
[738] Tr. at 988; Exh. ULG-84 at 5.
[739] Tr. at 988-989.
[740] Tr. at 990-991; Exh. S-46 at 10-11 of 184.
[741] Tr. at 992-993, 995; Exh. S-46 at 7 of 184, ULG-84 at 5.

standard of care in some circumstances.[742] Mr. Higgins testified that he did not find anything to lead him to believe that Ms. Kern-Fuller violated South Carolina's rules of professional conduct.[743] Mr. Higgins testified that the South Carolina Bar's website indicates that Ms. Kern-Fuller is in good standing without any published disciplinary actions against her.[744]

Mr. Higgins testified that he did not dispute the findings of the state cease and desist orders finding the income stream products to be securities and that he did not dispute the February 23, 2017 Mississippi order that found the investments were indistinguishable ventures based upon the similarities in the products and marketing thereof as well as the overlapping parties involved, however, Mr. Higgins testified that he did not believe ULG and Ms. Kern-Fuller gave securities advice.[745] Mr. Higgins testified that he did not know how someone could disclose the cease and desist orders if they were unaware of them.[746]

On cross-examination, when Mr. Higgins was confronted by Ms. Plant's testimony before the United States Bureau of Consumer Financial Protection that Ms. Kern-Fuller talked about the transactions not being securities in a meeting at VFG, Mr. Higgins stated that he would need more context to determine whether Ms. Kern-Fuller gave securities advice.[747] Mr. Higgins testified that there is a difference between having discussions regarding securities as opposed to actually providing advice on securities and he had not seen or heard anything that ULG or Ms. Kern-Fuller provided advice regarding securities.[748] Mr. Higgins testified that regardless of whether ULG was competent to provide securities advice, ULG is allowed to rely on conclusions of other attorneys who do have securities expertise.[749]

When presented with the argument by Ms. Kern-Fuller and ULG's attorney made before a federal judge on April 4, 2018, that the investor in these transactions has no rights and the investment is unenforceable, Mr. Higgins testified that he believed this statement was taken out of context and that

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[742] Tr. at 993.
[743] Tr. at 995-996.
[744] Tr. at 1108-1109.
[745] Tr. at 997-1001.
[746] Tr. at 1112-1113.
[747] Tr. at 1001-1003; Exh. S-195a at ACC000277-ACC000278.
[748] Tr. at 1020.
[749] Tr. at 1116.

the lawyer meant that investors do not have rights against the government rather than they have no rights at all.[750]

Mr. Higgins testified that he was being compensated at a rate of $450 per hour, for at least 18 hours, for his work in this case.[751] Mr. Higgins testified that he would not be testifying for ULG and Ms. Kern-Fuller if he was not being paid.[752]

On re-direct, Mr. Higgins testified that he did not believe he was required to read case law and statutes he was asked about on cross-examination in rendering his opinion.[753] Mr. Higgins testified that the exhibits raised on cross-examination did not change any of his opinions.[754]

Mr. Higgins testified that the Freeman Report was written before the Amended Notice and the Amended Answer of ULG and Ms. Kern-Fuller were filed.[755]

Mr. Higgins testified that a lawyer can limit the scope of representation regarding Rule 1.2 of the South Carolina Rules of Professional Conduct.[756]

Mr. Higgins testified that he had no knowledge whether changes requested by Ms. Kern-Fuller frequently were not accepted by attorney Jason Davis.[757]

Mr. Higgins testified that he had no knowledge that the debt arbitrage contract offered by PAC or LFO was a debt arbitrage option rather than an actual contract for sale of payment as with BAIC, VFG and SoBell, or that buyers could continue with the transaction with or without the option.[758]

Mr. Higgins testified that he was not aware lawyers at VFG, BAIC, and SoBell all made changes to the documents involved in these transactions.[759] Mr. Higgins testified that he was not aware that PAC documents were created by attorneys Jennifer and John Vermillion.[760] Mr. Higgins testified that he was not aware that the entire time Ms. Plant worked at VFG, BAIC, and PAC that those entities all

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[750] Tr. at 1009-1010.
[751] Tr. at 1015-1016.
[752] Tr. at 1016.
[753] Tr. at 1017-1018.
[754] Tr. at 1018.
[755] Tr. at 1019.
[756] Tr. at 1021.
[757] Tr. at 1111.
[758] Tr. at 1114.
[759] Tr. at 1114.
[760] Tr. at 1114.

had their own counsel who drafted documents and gave those entities legal advice.[761] Mr. Higgins testified that nothing in Ms. Plant's CFB testimony would conflict with Mr. Gamber's in-house counsel always being present when Ms. Kern-Fuller met with Mr. Gamber.[762]

Mr. Higgins testified that he was not aware that the income stream sales at issue began a number of years before ULG, PAC, and LFO were involved in these transactions.[763] Mr. Higgins testified that he was not aware that the credit reports were provided by the sellers and not run by ULG.[764]

Mr. Higgins testified that his affidavit was based upon documents themselves whereas Professor Freeman's opinion was based upon someone's explanation of what they intend to prove at trial.[765]

Mr. Higgins testified that he took no position as to whether the transactions were securities or assignments and that his opinion stands regardless of whether the transactions are securities or assignments.[766]

Mr. Higgins testified that Mr. Freeman's report was based on assumptions and conclusions that Mr. Higgins would have some trepidation about.[767]

Mr. Higgins testified that based upon documents provided to him, he concluded that Ms. Kern-Fuller had done the due diligence to satisfy herself that these transactions were not securities.[768]

Candy Kern-Fuller - Respondent

Ms. Kern-Fuller, on the advice of counsel, exercised her right to remain silent in response to numerous questions, including:

- Are you licensed in South Carolina as an attorney?[769]
- As a licensed lawyer in South Carolina, you are subject to the rules of professional conduct in South Carolina?[770]

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[761] Tr. at 1115.
[762] Tr. at 1115.
[763] Tr. at 1116.
[764] Tr. at 1116.
[765] Tr. at 1119-1120; Exh. ULG-84 at 4.
[766] Tr. at 1121-1122.
[767] Tr. at 1122-1124; ULG-84 at 5.
[768] Tr. at 1125.
[769] Tr. at 1033.
[770] Tr. at 1033.

- You concede that a lawyer cannot mislead others in a transaction and cannot fail to disclose material facts when disclosure is needed to avoid assisting wrongdoing by a client?[771]
- You concede that a lawyer must withdraw from representation if the representation will result in violation of the rules of professional conduct or other law?[772]
- You concede that a lawyer must either avoid conflicts of interest or have their client's written consent in the form of a waiver to participate in conflicted transactions?[773]
- Do you have any written waivers concerning the transactions involved in this case?[774]
- It's wrongful for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation?[775]
- You have seen the SEC investor alert regarding pension stream sales?[776]
- When did you first see the SEC investor alert regarding pension stream sales?[777]
- When did you first read the Anti-Assignment Acts?[778]
- Have you ever read the Anti-Assignment Acts?[779]
- Are you familiar with a company called BAIC?[780]
- The acronym BAIC stood for Buyers of Annuities and Investment Contracts, correct?[781]
- Are you familiar with Mr. DeSimone seeking information from you and your law firm about the status of payments to his clients?[782]
- You and your employees told him, "We are not responsible," didn't you?[783]
- What was the reason for switching from a system where the veterans made direct wire deposits into your trust accounts to assist them where ULG had ACH access to veterans' bank accounts

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[771] Tr. at 1035-1036.
[772] Tr. at 1036.
[773] Tr. at 1036-1037.
[774] Tr. at 1037.
[775] Tr. at 1037.
[776] Tr. at 1037.
[777] Tr. at 1037-1038.
[778] Tr. at 1038.
[779] Tr. at 1038.
[780] Tr. at 1038.
[781] Tr. at 1038.
[782] Tr. at 1038-1039.
[783] Tr. at 1039.

for the purpose of funding payments to the sellers?[784]

- In 2016 or 2017 did SunTrust Bank tell you that it was going to close your accounts that handled these transactions?[785]
- Did SunTrust inform you that they were requiring you to leave the bank because your activities at the bank were triggering suspicious activities?[786]
- Did SunTrust Bank tell you that you need to close your IOLTA account and move your business elsewhere because they believed the transactions you were facilitating through their bank were fraudulent and potentially criminal?[787]
- You moved your accounts from SunTrust Bank elsewhere because SunTrust Bank told you that they thought the transactions were fraudulent and potentially criminal and instructed you to leave their bank?[788]
- Were you present in federal court in Greenville when your attorney, David Overstreet, told the court that, essentially, the investors had no enforceable rights to receive payments from the veterans?[789]
- What due diligence did you do in vetting these transactions?[790]
- In South Carolina is a lawyer's IOLTA trust account inherently any safer than a non-IOLTA trust account?[791]
- Before last week had you ever heard of ULG being viewed as incompetent in assisting in client transactions?[792]
- How many suits, counterclaims, or third-party claims are pending against you and your law firm?[793]
- You rely on the Friday law firm memo, which was dated in 2011, which your counsel has

[784] Tr. at 1039.
[785] Tr. at 1039.
[786] Tr. at 1039-1040.
[787] Tr. at 1040.
[788] Tr. at 1040.
[789] Tr. at 1040-1041.
[790] Tr. at 1041.
[791] Tr. at 1041.
[792] Tr. at 1041.
[793] Tr. at 1041-1042.

submitted as an exhibit in your defense, true?[794]

- After the Arkansas Securities Division issued its first cease and desist order in April 2013, did you attempt to get an updated opinion from the Friday law firm regarding these transactions?[795]
- After the second cease and desist order was entered in 2014 by the state of Arkansas concerning these transactions, did you attempt to get an updated opinion from the Friday law firm?[796]
- After a consent order was entered in Arkansas in 2014, did you attempt to get an updated opinion from the Friday law firm concerning these transactions?[797]
- What is a closing book?[798]
- What is a fulfillment kit?[799]
- What was ULG's role in writing, revising, or editing the verbiage in the closing books and fulfillment kits?[800]
- With respect to the investments at issue, the sole source of the money to be paid to the investor was the military payment going to the veteran, correct?[801]
- The investment documents did not say that the veteran would pay money to the investor each month from his income regardless of whatever source that income came from, did it?[802]
- Rather the source of payments, as defined in the contract for sale payments, was the military pension or disability payments, correct?[803]
- Because the veterans' payment, from either the Veterans Affairs Administration or from the Department of Defense, was the sole source of payment to the investor, that is why the change of payment address verification form only applied to income streams from the military pension or disability benefits, correct?[804]
- The security agreements that are part of each closing book and fulfilment kit describe the

[794] Tr. at 1042; Exh. ULG-81.
[795] Tr. at 1042.
[796] Tr. at 1042.
[797] Tr. at 1042-1043.
[798] Tr. at 1043.
[799] Tr. at 1043.
[800] Tr. at 1043.
[801] Tr. at 1043.
[802] Tr. at 1044.
[803] Tr. at 1044.
[804] Tr. at 1044.

collateral as the right to receive the income stream in the amount of whatever the monthly payment is to be associated with, then it references the accounts/annuity and the veteran's Social Security number, correct?[805]

- The veteran's Social Security number is associated with their rights to the DFAS pension or Veterans Administration disability benefits, correct?[806]
- The purported security interest that the documents purport to give the investor attaches to the payments from either the VA or the Veterans Administration?[807]
- Under 38 USC Section 5301(a)(1), those payments are deemed to be, "exempt from the claim of creditors and shall not be liable for attachment, levy, or seizure under any legal or equitable process, whatever, either before or after receipt by the beneficiary," correct?[808]
- ULG's Escrow Services and Fee Agreements retainer agreements with the investors in these transactions provide that ULG would provide legal services to the investors, correct?[809]
- The legal services that ULG would provide would be with respect to the investments that the investors were making, correct?[810]
- Your legal representation of the investors, and the obligations imposed on you as an attorney with respect to those investors, began before the closing of the transaction, correct?[811]
- You did not disclose material information to the investors in connection with these transactions?[812]
- You did not disclose to the investors Andrew Gamber's association with the investments they were making, did you?[813]
- You did not disclose the risks that Mr. Gamber's association with these investments posed given his terrible track record as an insurance agent and now in the securities industry, did you?[814]

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[805] Tr. at 1044-1045.
[806] Tr. at 1045.
[807] Tr. at 1045.
[808] Tr. at 1045-1046.
[809] Tr. at 1046; Exh. ULG-76.
[810] Tr. at 1046.
[811] Tr. at 1047.
[812] Tr. at 1047.
[813] Tr. at 1047-1048.
[814] Tr. at 1048.

- You prepared and revised the investment documents that the investors signed, didn't you?[815]
- You prepared and revised the risk disclosures contained in the investment documents that the investors signed, didn't you?[816]
- Those risk disclosures and other investment documents that you prepared and revised did not disclose to the investors the existence of the Federal Anti-Assignment Acts, did they?[817]
- The investment documents and disclosures that you prepared did not disclose to the investors that they had no enforceable rights to repayment of their investments?[818]
- The investment documents and risk disclosures, that you prepared and that were presented to investors, did not disclose the court rulings that ruled transactions of a similar nature to be unenforceable under the Anti-Assignment Acts?[819]
- The retainer agreement that you had with the investors provided that ULG was going to be a fiduciary escrow agent with respect to investors, didn't it?[820]
- Is it your understanding as an attorney that a fiduciary has an obligation of full disclosure and candor to those to whom the fiduciary owes the fiduciary duties?[821]
- The Escrow Services and Fee Agreement stated that ULG's attorneys' fees are "[i]ncluded in the Purchase Price (as that term is defined in the Purchase Application) paid by the Buyer." Isn't it true that the buyers' payment proceeds were used to pay the distributors' attorneys' fees with your firm?[822]
- With respect to your representation of the distributors, you did not, at the end of each month, send them a bill for your legal services, did you?[823]
- Instead, you took your attorneys' fees that were attributable to the distributor out of the proceeds at closing, didn't you?[824]

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[815] Tr. at 1048.
[816] Tr. at 1048-1049.
[817] Tr. at 1049.
[818] Tr. at 1049.
[819] Tr. at 1049-1050.
[820] Tr. at 1050; Exh. ULG-76.
[821] Tr. at 1050.
[822] Tr. at 1050-1051; Exh. ULG-76.
[823] Tr. at 1051.
[824] Tr. at 1051.

- You never disclosed to the investors that they were paying your other client's, the distributors', attorneys' fees, did you?[825]
- The investment risks in these transactions fell on the investor rather than on BAIC, SoBell, SMI, FPD, PAC, or ULG, because those entities got fully paid at the closing, correct?[826]
- The risk rested entirely with the investor as to whether the investor would get repaid or not, correct?[827]
- The investors invested their retirement savings in these products, correct?[828]
- You, ULG, Mr. Gamber, BAIC, SoBell, PAC, Ms. Plant, Financial Product Distributors, and SMI were all engaged in a common enterprise, weren't you?[829]
- The investors invested in your common enterprise with the expectation that they would receive a modest profit in the form of modest returns paid out overtime, correct?[830]
- The investors' expectation that they would receive small returns and small profits was dependent upon the efforts of you and ULG and the other middlemen in this scheme, correct?[831]
- Did the closing book documents that you prepared and revised purport to create a binding and legally enforceable contractual obligation?[832]
- Was the contractual obligation that those closing books created, or purported to create, obligate the veterans to pay and the investors to receive future payments from the veterans' pension or disability benefits?[833]
- The contractual obligation also provided that in exchange for an upfront lump sum payment to the veteran, the future payments would be made to the investor, correct?[834]
- So the investment documents that you prepared and revised purported to create a contractual obligation for the veteran to pay in the future in exchange for consideration received in the

[825] Tr. at 1051.
[826] Tr. at 1051-1052.
[827] Tr. at 1052.
[828] Tr. at 1052.
[829] Tr. at 1052.
[830] Tr. at 1053.
[831] Tr. at 1053.
[832] Tr. at 1054.
[833] Tr. at 1054-1055.
[834] Tr. at 1055.

present in the form of the lump sum payments, correct?[835]

- You saw the SMI marketing materials as early as 2014, didn't you?[836]
- You discussed the SMI marketing materials with Mr. Gamber before they were used with investors, didn't you?[837]
- You were well aware that these marketing materials represented ULG's role as buyers' representation, correct?[838]
- You were well aware that at the time that these marketing materials represented that, as buyer's legal representation, ULG would represent the investors' interests and protect them, correct?[839]
- And you knew that those representations were false, correct?[840]
- You and ULG did not act in these transactions to protect your clients, the investors, did you?[841]
- You concealed from the investors the Anti-Assignment Acts, didn't you?[842]
- You also concealed from the investors the court rulings that had ruled transactions of this nature to be unenforceable, didn't you?[843]
- Instead, you and the marketing materials represented to the investors that certain courts had upheld these transactions, didn't you?[844]
- And without disclosing the cases and the court rulings that invalidated these transactions, the representation to the investors that certain courts have upheld these transactions was a half-truth, right?[845]
- You wrote an email to Drew Gamber, Jason Davis, and David Woodard on July 11, 2014, about the increasing number of first month defaults that you were having, correct?[846]
- You were concerned amongst yourselves about the increasing number of first month defaults

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[835] Tr. at 1055.
[836] Tr. at 1056-1057; Exhs. S-73, S-74.
[837] Tr. at 1057; Exhs. S-73, S-74.
[838] Tr. at 1057-1058; Exhs. S-73, S-74.
[839] Tr. at 1058.
[840] Tr. at 1058.
[841] Tr. at 1058.
[842] Tr. at 1059.
[843] Tr. at 1059.
[844] Tr. at 1059-1060.
[845] Tr. at 1060.
[846] Tr. at 1061-1062; Exh. S-192.

you were having with veterans, correct?[847]

- Do you know how many of the investments at issue in this case were sold after you wrote this on July 11, 2014?[848]
- You never informed all the investors in Arizona, and all over the United States, who purchased these investments after July 11, 2014 about your concern over the number of first month defaults, did you?[849]
- Do you know the amount of the investors' losses in this case?[850]
- The losses, just for Arizona investors, are in the millions of dollars, aren't they?[851]
- Did Arizona investors pay $2,776,952 to purchase the 53 investments at issue in the 2013 to 2015 timeframe?[852]
- Does Exhibit S-42 show that the investors from the six investments Mr. DeSimone sold between March 2017 and June 2017 collectively paid $371,991.23 for their investments?[853]
- Isn't it true that you and ULG asserted payment as an affirmative defense in your answer to the original Notice?[854]
- And in the Amended Answer, you and ULG again alleged payment as an affirmative defense, correct?[855]
- You would agree that ULG, as the escrow agent, should have the accounting of how much money the investors, whose investments are at issue in this case, were repaid from the veterans payments, correct?[856]
- In performing escrow services in South Carolina, ULG is required by the rules of the South Carolina Supreme Court to keep detailed and meticulous records regarding the escrow transactions in this case, correct?[857]

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[847] Tr. at 1061-1062.
[848] Tr. at 1062.
[849] Tr. at 1062.
[850] Tr. at 1063.
[851] Tr. at 1063.
[852] Tr. at 1065; Exh. S-79.
[853] Tr. at 1065; Exh. S-42.
[854] Tr. at 1065.
[855] Tr. at 1066.
[856] Tr. at 1066.
[857] Tr. at 1066.

- You have not provided any of the underlying accounting records to show how much any of the investors in this case have been repaid, have you?[858]
- One of the exhibits that you submitted as purported proof of payment, Exhibit ULG-73, is a spreadsheet purportedly showing repayment to some investors in the 2013, 2015 timeframe?[859]
- Do you know whether your counsel received the Division's request that the underlying documents and data used to prepare Exhibit ULG-73 be produced to the Division?[860]
- Do you know whether your counsel produced to the Division any of the underlying documents that were used to create Exhibit ULG-73?[861]
- Did you prepare Exhibit ULG-73?[862]
- Did someone at ULG prepare Exhibit ULG-73?[863]
- Did someone at your counsel's law firm create Exhibit ULG-73?[864]
- Did you prepare Exhibit ULG-9?[865]
- Did ULG prepare Exhibit ULG-9?[866]
- Either you or ULG prepared exhibit ULG-9, correct?[867]
- Either you or ULG prepared Exhibit ULG-73, correct?[868]
- ULG jointly and simultaneously represented both the investors and the distributors in these transactions, is that not true?[869]
- Isn't it true that the investors and the distributors had conflicting interests in these transactions?[870]

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[858] Tr. at 1067.
[859] Tr. at 1067.
[860] Tr. at 1067. Ms. Kern-Fuller testified that she had not been provided any subpoena or "any other formal request under the rules" before invoking her Fifth Amendment right to remain silent. Tr. at 1067. Ms. Kern-Fuller also asserted attorney-client privilege. Tr. at 1067.
[861] Tr. at 1068-1069.
[862] Tr. at 1069.
[863] Tr. at 1069.
[864] Tr. at 1070.
[865] Tr. at 1070-1071.
[866] Tr. at 1071.
[867] Tr. at 1071.
[868] Tr. at 1071.
[869] Tr. at 1071-1072.
[870] Tr. at 1072.

- Those conflicting interests existed at the outset of this transaction, isn't that true?[871]
- And you represented, jointly and simultaneously, both the investors and the distributors without any informed consent of the conflicts to the investors, correct?[872]
- You didn't have any waivers from the investors of the potential and actual conflicts of interest they had with the distributors whom you also represented, correct?[873]
- Exhibit S-191 is an email from your law partner, Howard E Sutter, III, dated February 16, 2017, correct?[874]
- And Mr. Sutter was writing to Kathleen Galloway, who was an attorney at the Dallas office of the SEC, isn't that true?[875]
- In his email, Mr. Sutter wrote to the SEC that ULG is corporate counsel for PAC, correct?[876]
- And it was true that ULG was corporate counsel to PAC, correct?[877]
- And you and ULG purported to represent the investors at the very same time that you were representing PAC, correct?[878]
- And at the same time that you were representing the investors and PAC, there existed actual conflicts of interest between the investors and PAC, correct?[879]
- With respect to the 2013 to 2015 investors, PAC was obligated to pay those investors in the event of default, correct?[880]
- And you represented those 2013 to 2015 investors at the same time that you and ULG were corporate counsel for PAC, correct?[881]
- You and ULG represented the investors in the 2017 transactions, correct?[882]
- And at the same time you were purporting to represent those 2017 investors, you and ULG were

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[871] Tr. at 1072.
[872] Tr. at 1072.
[873] Tr. at 1072-1073.
[874] Tr. at 1073.
[875] Tr. at 1073.
[876] Tr. at 1073-1074.
[877] Tr. at 1074.
[878] Tr. at 1074.
[879] Tr. at 1074.
[880] Tr. at 1074-1075.
[881] Tr. at 1075.
[882] Tr. at 1075.

PAC's corporate counsel, correct?[883]

- And the investors in the 2017 investments and PAC also had conflicting interests, didn't they?[884]
- You and ULG purported to proceed with representing both the investors and PAC without any disclosure to the investors of the conflicts of interest or waivers of those conflicts from the investors, isn't that true?[885]
- Exhibit ULG-79 is a letter that you authored, dated April 18, 2014, to the Office of Disciplinary Counsel of the Supreme Court of South Carolina, is that true?[886]
- In that letter to the Office of Disciplinary Counsel, you asserted, without any qualification, that the investments at issue in this case are "private transactions between a buyer and seller that are not securities," correct?[887]
- And you further represented to the Office of Disciplinary Counsel that these investments are "not required to be registered or handled as a security on the state or federal level," correct?[888]
- But you do not have the legal education or training or experience to be able to state whether the transactions are or are not securities, do you?[889]
- In fact, you put in your retainer agreement with the distributors that no one at ULG was competent to provide advice on securities issues, is that true?[890]
- ULG represented BAIC between the 2013 to the 2015 timeframe, didn't it?[891]
- ULG also represented SoBell Corp throughout the 2013 to 2015 timeframe, correct?[892]
- And throughout the 2013 to 2015 timeframe ULG also represented SMI, correct?[893]
- With respect to the 21 Arizona investors who invested between 2013 and 2015, you and ULG purported to represent them during that period, correct?[894]

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[883] Tr. at 1075-1076.
[884] Tr. at 1076.
[885] Tr. at 1076.
[886] Tr. at 1076-1077; Exh. ULG-79.
[887] Tr. at 1077; Exh. ULG-79 at 4.
[888] Tr. at 1077; Exh. ULG-79 at 4.
[889] Tr. at 1077-1078.
[890] Tr. at 1078; ULG-75 at 2 of 9.
[891] Tr. at 1078.
[892] Tr. at 1078.
[893] Tr. at 1078-1079.
[894] Tr. at 1079.

- And commencing in the 2013 to 2015 timeframe, depending on which investor invested on what date, you and ULG have continued to represent those investors right to this day, isn't that true?[895]
- With respect to the four investors who purchased the six investments at issue in the 2017 timeframe, you and ULG have represented those investors from the date of their investments until the present, correct?[896]
- In the Amended Answer filed by counsel for you and ULG, you assert as an affirmative defense that the transactions at issue were exempt from registration and/or licensing provisions, is that an affirmative defense of yours?[897]
- What exemption or exemptions from the registration and/or licensing provisions of the Arizona Securities Act do you and ULG claim?[898]
- In the Amended Answer, you and ULG also assert contributory negligence as an affirmative defense, who do you claim was contributorily negligent?[899]
- You also assert in the Amended Answer, as an affirmative defense, that the claims in the Amended Notice are barred by assumption of risk. What risk is it that you assert that the investors assumed?[900]
- Also in the Amended Answer, as an affirmative defense, you assert that the investors' losses were caused "by the investors' own acts or omissions, and/or by the investors' failure to mitigate their damages." What acts or omissions do you claim that the investors engaged in that caused their losses?[901]
- What is your theory as to how the investors purportedly failed to mitigate their damages or losses in this case?[902]
- Is Exhibit ULG-80 a letter that you wrote, dated April 19, 2018, to the South Carolina

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[895] Tr. at 1079.
[896] Tr. at 1079-1080.
[897] Tr. at 1080.
[898] Tr. at 1080.
[899] Tr. at 1080-1081; Amended Answer at 16.
[900] Tr. at 1081; Amended Answer at 16.
[901] Tr. at 1081-1082; Amended Answer at 17.
[902] Tr. at 1082.

Department of Consumer Affairs?[903]

- In Exhibit ULG-80, you inserted an excerpt from a document that the veteran was required to sign in connection with these transactions, correct?[904]
- The document that the veteran had to sign that you excerpt in your letter stated to the veteran "You affirm and understand that you may withdraw from this transaction at any time before closing for any reason, but that once this transaction is completed that if you repudiate or breach this agreement you will subject yourself to civil and/or criminal prosecution." You drafted and prepared the excerpted language in ULG-80, correct?[905]
- That language, that you prepared, purported to threaten the veterans with criminal prosecution if they did not pay under these investments, correct?[906]
- Do you know whether it is illegal to threaten a criminal prosecution in an effort to collect a debt?[907]
- The statement in the language you prepared to the veterans, to the effect that if they breached the agreement they would be subjected to criminal prosecution, was a false statement of law, wasn't it?[908]
- With respect to the language threatening criminal prosecution that you prepared in the document that Ms. Blunt signed in connection with her sale of her military benefits, this was a false statement of law, correct?[909]
- Do you know whether any provision of the South Carolina Rules of Professional Conduct prohibits lawyers from making false statements of law to third parties?[910]
- You know that the South Carolina Rules of Professional Conduct prohibit lawyers from making false statements of law to third parties, correct?[911]
- You know that the statement to Ms. Blunt purporting to threaten criminal prosecution was a

[903] Tr. at 1082; Exh. ULG-80.
[904] Tr. at 1082-1083; Exh. ULG-80.
[905] Tr. at 1083; Exh. ULG-80 at 2 of 6.
[906] Tr. at 1083-1084; Exh. ULG-80 at 2 of 6.
[907] Tr. at 1084.
[908] Tr. at 1084; Exh. ULG-80 at 2 of 6.
[909] Tr. at 1085.
[910] Tr. at 1086.
[911] Tr. at 1086.

false statement of law that violates that provision of the South Carolina Rules of Professional Conduct, correct?[912]

- When the investors' investments defaulted and they weren't getting paid, you didn't bring any lawsuits against the distributors, did you?[913]
- You didn't advise any of the Arizona investors, whose investments defaulted, that they might have legal rights against SMI or FPD, the distributors in this action, did you?[914]
- And you didn't advise any of the Arizona investors whose investments defaulted that they might have claims and rights of action against BAIC, SoBell, or PAC, did you?[915]
- Instead, to the extent you have communicated with the Arizona investors in this matter whose investments have defaulted, you advised them to sue the veterans, haven't you?[916]
- And you advised those Arizona investors that they could retain ULG to represent them in those collection actions against the veterans, isn't that correct?[917]
- So instead of advising investors that perhaps they should sue SMI, BAIC, Sobell, PAC, or ULG, you advised them instead to sue the veteran, correct?[918]
- What are the suicide wrappers that are referenced in communications regarding these investments?[919]
- Didn't the suicide wrapper purport to deal with the concern of veterans with PTSD, who you and your cohorts were concerned might commit suicide?[920]
- You were concerned that you and your cohorts wouldn't get paid if those veterans committed suicide, right?[921]
- Isn't it true that you voluntarily and intentionally devised and participated in a scheme to defraud the investors out of money?[922]

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[912] Tr. at 1086-1087.
[913] Tr. at 1087.
[914] Tr. at 1087.
[915] Tr. at 1087.
[916] Tr. at 1087-1088.
[917] Tr. at 1088.
[918] Tr. at 1088.
[919] Tr. at 1088.
[920] Tr. at 1089.
[921] Tr. at 1089.
[922] Tr. at 1090.

- Isn't it true that you voluntarily and intentionally devised and participated in a scheme to defraud veterans?[923]
- Isn't it true that you acted towards the veterans and towards the investors with the intent to defraud them?[924]
- Isn't it true that in your scheme it was reasonably foreseeable that interstate wire communications would be used?[925]
- Isn't it true that between October 2013 and November 2015 you, in fact, used interstate wire communications by sending emails across state lines and by using telephone communications across state lines?[926]
- Since 2017, you have communicated from South Carolina to Arizona by emails, haven't you?[927]
- And you have communicated since 2013 across state lines from South Carolina to Arkansas with Ms. Plant concerning the transactions in this case, correct?[928]
- Isn't it true that since at least October 2013, you have communicated with Mr. Smith and Mr. DeSimone here in Arizona from South Carolina using emails and telephone lines?[929]

III. Legal Argument

A. Evidentiary, Procedural and Other Preliminary Issues

1. Jurisdiction

Ms. Plant contends that the Commission lacks jurisdiction over this matter. Ms. Plant contends that the Division has failed to prove that the income stream investments are securities. Article XV of the Arizona Constitution and the Securities Act, A.R.S. §§ 44-1801, *et. seq.*, grant the Commission the authority to conduct investigations and convene hearings that are necessary and proper for the enforcement of the Securities Act. In this case, the Division, following an investigation, has alleged that the Respondents have committed violations of the Securities Act. The Commission has jurisdiction to consider the allegations of the Division.

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[923] Tr. at 1090.
[924] Tr. at 1090.
[925] Tr. at 1090-1091.
[926] Tr. at 1091.
[927] Tr. at 1092.
[928] Tr. at 1092.
[929] Tr. at 1092-1093.

2. Assertion of Privilege by Candy Kern-Fuller

The ULG Respondents assert that the Commission should not draw adverse inferences from Ms. Kern-Fuller exercising her Fifth Amendment privilege against self-incrimination.[930] The ULG Respondents contend that while a court has discretion in a civil case to draw an adverse inference when a party asserts privilege, the claim of privilege may not be deemed an admission.[931] The ULG Respondents further note that a court may not draw an adverse inference without sufficient independent evidence to establish the fact about which the party refuses to testify.[932] However, the ULG Respondents urge the Commission not to draw adverse inferences from Ms. Kern-Fuller's invocation of privilege as "the Arizona Supreme Court has yet to rule on whether an adverse inference in a quasi-criminal agency action brought by the government would be an affront to the Arizona Constitution."[933]

The Division contends that "[A] witness or party in a civil case can invoke their Fifth Amendment privilege against self-incrimination … but the trier of fact is free to infer the truth of the charged misconduct."[934] The Division contends that no Arizona authority limits adverse inferences in a civil case when the government is a party, and that the Commission is not a "quasi criminal" agency as the Commission cannot bring criminal actions for securities violations.

We agree with the Division that no controlling authority prevents the Commission from making adverse inferences against Ms. Kern-Fuller and ULG[935] based on Ms. Kern-Fuller's invocation of the Fifth Amendment privilege at the hearing. We find no compelling basis to restrict our ability to consider the evidence presented at hearing. Accordingly, we hold that the Commission may make adverse inferences based upon Ms. Kern-Fuller's invocation of privilege.

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[930] The ULG Respondents direct their argument against the finding of an adverse inference from Ms. Kern-Fuller's assertion of the privilege specifically regarding the question of whether the income stream investments are evidences of indebtedness, and generally against the Commission drawing any adverse inferences. As we decline to consider whether the income stream investments are evidences of indebtedness, *infra*, we consider only the general aspect of the ULG Respondents' argument.

[931] Citing *Nat'l Acceptance Co. of Am. v. Bathalter*, 705 F.2d 924, 932 (7th Cir. 1983).

[932] Citing, e.g., *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 119 (5th Cir. 1990); *Prudential Ins. Co. of Am. v. Thomas*, No. CV-16-08171-PCT-JJT, 2018 WL 3586439, at *3 (D. Ariz. July 26, 2018).

[933] ULG Respondents Post-Hearing Br. at 35.

[934] *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 53, ¶ 20, 213 P.3d 197, 202 (App. 2009).

[935] *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308, 316-319, 96 S. Ct. 1551, 1557-1558, 47 L. Ed. 2d 810 (1976); *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 673-675 (5th Cir. 1999) (fact-finder may draw an adverse inference against a party from the assertion of the Fifth Amendment privilege by a witness whose interests are aligned, such as the party's agents or representatives).

3. Procedural Issues Raised by Michelle Plant

Ms. Plant contends that she was improperly served by the Division. Ms. Plant contends that the Division sent the Notice to an address that had not been her last known business address for over eighteen months. Ms. Plant states that she was not actually served until May 1, 2019, at her home address. Ms. Plant notes that the Division served her again with the Notice and a copy of the Sixth Procedural Order on May 9, 2019, demonstrating that the Division knew the initial service was not proper. Ms. Plant argues that her equal protection and due process rights were violated as she had a little over three months to prepare for the hearing as opposed to other parties who had a year, "severely impairing her ability to find counsel."[936]

Ms. Plant contends that the Division attempted to force Ms. Plant to waive her argument of improper service in the Division's August 13, 2019 Response to her Motion for Telephonic Appearance by stating "[t]he Division does not oppose to [sic] Respondent Plant appearing by telephone provided … her erroneous assertion about when the Division properly served her is disregarded."[937]

Ms. Plant also contends that the Division attempted to create bias against her in the Division's Response to her Motion for Telephonic Appearance by requesting that she use a separate phone line from the investor witnesses because it would be "distressing" to the investor-witnesses.[938] Ms. Plant contends that the Division's August 16, 2019 Response to her Motion for Continuance also attempted to create bias and gave the improper impression that the Division did not know why she was requesting the continuance. Ms. Plant cites the Division's assertions that she "had taken no steps to prepare" and had shown a "lack of diligence."[939] Ms. Plant further contends that she was defamed by the Division's argument that she failed to present good cause for a continuance and that she was requesting an indefinite delay by not identifying a specific length of time for a continuance.

The Division contends that it provided valid service and Ms. Plant waived any claim of improper service by participating in the proceeding. The Division notes that it served Ms. Plant with the Notice on August 20, 2018, by certified mail at her last known business address for PAC in

[936] Plant Post-Hearing Br. at 60.
[937] Securities Division's Response to Motion for Telephonic Appearance by Michelle Plant (August 13, 2019).
[938] *Id.*
[939] Securities Division's Response to Motion for Continuance (August 16, 2019).

Flowood, Mississippi.[940] The Division contends that service was proper pursuant to the Commission's Rules, A.A.C. R14-4-303(D), which provides for service by certified mail to an individual's last known business address or mailing address. The Division contends that it received notification of Ms. Plant's home address on May 1, 2019, and then served her a second time on May 9, 2019, with a copy of the Notice and a copy of the Sixth Procedural Order setting the hearing for August 19, 2019.[941] The Division notes that Ms. Plant did not respond or request a hearing. The Division states that Ms. Plant was served with the Amended Notice on July 16, 2019.[942]

The Division argues that it did not attempt to force Ms. Plant to waive her defense of improper service, rather the Division requested that the ALJ grant her request to appear telephonically and disregard the improper service claim as it was factually incorrect and irrelevant to the issue of telephonic appearance. The Division contends that Ms. Plant failed to raise the defense of improper service in her August 5, 2019 Answer to Amended Notice or in a motion to dismiss, therefore the affirmative defense had already been waived by the time the Division responded to Ms. Plant's Motion for Telephonic Appearance.

The Division contends that Ms. Plant was not denied due process from a lack of time to prepare for the hearing. The Division notes that, minimally, 102 days passed between the second time Ms. Plant was served with notice, on May 9, 2019, and the start of the hearing on August 19, 2019. The Division further notes that Ms. Plant waited until August 15, 2019, to request an extension and she failed to state good cause for an extension or to specify the length of an extension. The Division concedes that Ms. Plant provided more information in her Reply to the Division's Response to Motion for Continuance, including personal and family health issues and financial issues with hiring counsel, but she still did not establish good cause or identify a reason for her late request of a continuance. The Division further contends that Ms. Plant has not stated how she believes her presentation of evidence was prejudiced by a denial of her continuance.[943] The Division denies that it attempted to bias the factfinder and contends that there is no basis to say that the factfinder was biased.

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[940] *See* Affidavit of Service (August 28, 2018).
[941] *See* Affidavit of Service (June 13, 2019).
[942] *See* Affidavit of Service (July 31, 2019).
[943] Citing *State v. VanWinkle*, 230 Ariz. 387, 390, 285 P.3d 308, 311 (2012) (denial of continuance is not an abuse of discretion absent demonstrating prejudice).

The record established that the Division properly served the Notice on Ms. Plant by certified mail to her last known business address of record on August 20, 2018, pursuant to A.A.C. R14-4-303(D)(5). The Division properly served the Notice to Ms. Plant again on May 9, 2019, by personal service, pursuant to A.A.C. R14-4-303(D)(1), this time with a copy of the Procedural Order that set a hearing to commence on August 19, 2019. Ms. Plant was personally served with the Amended Notice on July 16, 2019. We find the service of Ms. Plant complied with the Commission's Rules.

Ms. Plant did not timely file a request for hearing, but she did file, on August 7, 2019, an Answer to the Amended Notice and a Motion for Telephonic Appearance at the hearing. The Commission's rules require that a hearing pursuant to a notice of opportunity shall be held within 60 days, but not earlier than 20 days, after a written request for a hearing is made, unless otherwise provided by law, stipulated by the parties, or ordered by the Commission.[944] Ms. Plant did not request a continuance of the hearing until August 15, 2019.[945] In finding that Ms. Plant did not establish good cause for a continuance, the ALJ noted that: Ms. Plant did not request a continuance at the time she filed a request to appear telephonically; Ms. Plant had the opportunity to review the exhibits, as evidenced by her motion to exclude some; and Ms. Plant had made the decision to represent herself and proceed without the benefit of counsel.[946] Ms. Plant has not shown any prejudice in having been denied a continuance of the hearing. We find no error in the ALJ's denial of Ms. Plant's request for a continuance.

Ms. Plant argues that the Division has attempted to engender bias against her. There is a legal presumption that an administrative decision maker acts with honesty and integrity.[947] Rebutting this presumption requires a showing of actual bias.[948] While Ms. Plant may take umbrage with certain statements of the Division, Ms. Plant has not cited any actual bias.

Having considered the due process violations alleged by Ms. Plant, we find no error was committed by the Division or the ALJ. Accordingly, Ms. Plant is entitled to no relief on this basis.

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[944] A.A.C. R14-4-306(C).
[945] Ms. Plant's Motion for Continuance was not received by Docket Control until August 16, 2019.
[946] Tr. at 40.
[947] *See Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 212 Ariz. 351, 357, 132 P.3d 290, 296 (App. 2006), as corrected (Mar. 9, 2006).
[948] *Id.*

4. Role of Veterans

Ms. Plant objects to the Division's references to veterans having been defrauded as part of the income stream investments. Ms. Plant contends that the Division sought to create bias against her. Ms. Plant cites as misconduct the Division's questioning of Ms. Kern-Fuller regarding a "suicide wrapper" provision.[949] In her Post-Hearing Brief, Ms. Plant makes numerous factual assertions not supported by the evidence of record regarding the suicide wrappers, as well as her personal experiences with veterans. Ms. Plant contends that the Division only brought cases involving veterans "in an attempt to confuse and obfuscate the legal issues and create an emotional response."[950]

The Division notes that it has not alleged any violations against the Respondents for defrauding veterans, rather the Division's allegations in the Amended Notice concern defrauding the investors. The Division argues that its questioning of another Respondent does not serve as a defense to securities fraud for Ms. Plant. The Division defends its questioning regarding the "suicide wrapper," a term used by the ULG Respondents,[951] which questions the Division considered provided important context as the Respondents portrayed the sale of the income stream investments as being motivated by a concern for veterans[952] and for the benefit of veterans.[953] The Division argues that it was entitled to rebut the Respondents' asserted good motives. The Division justifies bringing cases involving veterans by noting that the fraudulent omission of risks posed by the Federal Anti-Assignment Acts only applies to the sale of veterans' pensions and benefits, and, regardless, the Division has prosecutorial discretion to allege most if not all of the Respondents' violations.

No allegations of Securities Act violations have been made against the Respondents for their interactions with veterans in the income stream investments. However, the veterans' involvement was an indispensable element of the investments. Evidence that is irrelevant, immaterial or unduly repetitious is to be excluded from an administrative hearing.[954] The Division did not elicit excludable evidence. The Division has broad discretion in bringing an enforcement action. That additional

[949] Tr. at 1089.
[950] Plant Post-Hearing Br. at 19.
[951] Exh. ULG-10.
[952] *See, e.g.*, Exh. S-195a at 121.
[953] Exh. S-195a at 101-102, 118.
[954] A.R.S. § 41-1062(A)(1).

violations were not alleged by the Division does not serve as a defense to the violations that have been raised in the Amended Notice. Accordingly, we find Ms. Plant is entitled to no relief based on her arguments regarding veterans.

5. Application of the Arizona Securities Act

The Division notes that the Contract for Sale of Payments and the Purchase Assistance Agreement for each investment stated that South Carolina law would govern the investment.[955] The Division argues that the Securities Act's anti-waiver statute expressly prohibits any agreement purporting to waive the Securities Act's applicability: "Any condition, stipulation or provision binding any person acquiring any security to waive compliance with this chapter or chapter 13 of this title or of the rules of the commission is void."[956] The Legislature enacted A.R.S. § 44-2000 "to prevent sellers of securities from using contractual waivers or choice-of-law provisions to narrow the protection from fraud at which the Arizona Securities Act is aimed."[957]

The Respondents do not challenge the Division's argument that the applicability of the Securities Act cannot be waived in favor of South Carolina law. We find that A.R.S. § 44-2000 voids those provisions in the income stream investments that seek to remove the investments from consideration under the Securities Act.

B. Classification of the Investments

The Division contends that the income stream investments are securities. Arizona courts "give a liberal construction to the term 'security'"[958] The Division contends that the income stream investments are securities because they consisted of investment contracts, evidences of indebtedness, and notes. Investment contracts, evidences of indebtedness, and notes are all specifically included in the definition of a security under A.R.S. § 44-1801(27)(a). Therefore, if the record establishes that the income stream investments qualify as any of those three types of instruments, then the income stream investments are securities under the Act.

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[955] *See, e.g.*, Exhs. S-116 at ACC001498, ACC001509, S-21 at ACC000420, ACC000431.
[956] A.R.S. § 44-2000.
[957] *R & L Ltd. Investments, Inc. v. Cabot Inv. Properties, LLC*, 729 F. Supp. 2d 1110, 1113.
[958] *Siporin v. Carrington*, 200 Ariz. 97, 101, ¶ 18, 23 P.3d 92, 96 (App. 2001).

The ULG Respondents argue the holding of the Arizona Supreme Court that:

> A liberal construction is not synonymous with a generous interpretation, and we will not impose a burden or liability not within the terms or spirit of the law.... In short, we decline to judicially recognize potential securities-related claims that are not clearly established or necessarily implied by the [Securities Act].[959]

The ULG Respondents contend that the transactions are not investment contracts, evidences of indebtedness, or notes as established or implied by A.R.S. § 44-1801(27)(a) and, therefore, are not securities under the Securities Act. The ULG Respondents argue that the income stream transactions are similar to commodity futures contracts which have been held not to be securities.

Ms. Plant contends that she had been advised that the contracts involved in these transactions are not securities. Ms. Plant states that she had been advised that these contracts are "factoring contracts." Ms. Plant notes that the SEC, the Arkansas Department of Securities, and the Texas Department of Securities all reviewed this product and did not file complaints against PAC.[960]

The Division contends that knowledge of whether a product is a security is not an element of a securities law violation under A.R.S. §§ 44-1841, 44-1842, or 44-1991(A)(2). The Division further argues that acting on the advice of counsel is not a defense to allegations under A.R.S. §§ 44-1841, 44-1842, or 44-1991(A)(2) as neither scienter nor negligence are elements of any of those violations.[961] The Division contends that another agency could have many reasons for not bringing an enforcement action and it would be baseless speculation to conclude that the other agencies did not bring an action against PAC because they did not believe the contracts were securities.

1. Investment Contracts

The Division contends that the Respondents offered and sold securities in the form of investment contracts. The Division applies the *Howey*[962] test to conclude that the Respondents offered

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[959] *Sell v. Gama*, 231 Ariz. 323, 328, ¶ 23, 295 P.3d 421, 426 (2013) (internal quotes omitted).
[960] Exh. S-171 at ACC002371.
[961] "The defense of reliance on advice of counsel is known as a good faith defense or a due care defense insofar as it may counter elements of scienter or negligence respectively." *Draney v. Wilson, Morton, Assaf & McElligott*, 592 F. Supp. 9, 11 (D. Ariz. 1984).
[962] *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946).

and sold investment contracts. Pursuant to the *Howey* test, "an 'investment contract' arises whenever a person (1) invests money (2) in a common enterprise (3) with an expectation of profits from the efforts of others, and when such third-party efforts are 'the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.'"[963]

Ms. Plant contends that she had been advised that the product at issue in this case fails the *Howey* test. Ms. Plant makes no specific arguments regarding the prongs of the *Howey* test.

a) Investment of Money

i) Argument

The Division contends that the first element of the *Howey* test, the investment of money, has been met. The Division notes that the Purchase Assistance Agreement for each investment provided that "[t]he Purchase Price shall be paid in legal US Dollars…."[964] The Division argues that Mr. Smith testified that the investors invested money.[965] The Division contends that from 2013 through 2015, 21 investors collectively paid $2,776,952.62 for 53 investments.[966] The Division further contends that the 4 investors in 2017 paid $371,191.23 for six investments.[967]

The ULG Respondents contend that the first prong of the *Howey* test is determined by whether a buyer "chose to give up a specific consideration in return for a separable financial interest with the characteristics of a security."[968] The ULG Respondents contend that the transactions do not have the characteristics required to be a security under the *Howey* test. The ULG Respondents concede that some courts have held that the first prong of *Howey* "means only that the investor must commit his assets to the enterprise in such a manner as to subject himself to financial loss."[969] However, The ULG Respondents argue that this interpretation is overbroad, rendering the first prong meaningless because

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[963] *Siporin v. Carrington*, 200 Ariz. 97, 101 ¶ 19, 23 P.3d 92, 96 (App. 2001) (quoting *Nutek Info. Sys., Inc. v. Arizona Corp. Comm 'n*, 194 Ariz. 104, 108, 977 P.2d 826, 830 (App. 1998)).

[964] *See, e.g.*, S-116 at ACC001506 (Carolyn Strong); S-117 at ACC005298 (Thomas Strong); S-119 at ACC000462 (Dean Hebb); S-120 at ACC000514 (Dean Hebb); S-21 at ACC000427 (Moreno Legacy Trust); S-26 at ACC001152 (Frances Schlack).

[965] Tr. at 301.

[966] Exh. S-79 at 4.

[967] Exh. S-42 at 3.

[968] *S.E.C. v. SG Ltd.*, 265 F.3d 42, 48 (1st Cir. 2001), quoting *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 559, 99 S. Ct. 790, 796, 58 L. Ed. 2d 808 (1979).

[969] *Kingsley Capital Mgmt., LLC v. Sly*, 2013 U.S. Dist. LEXIS 108874, at *15, 2013 WL 3967615, at *5 (D. Ariz. Aug. 2, 2013), quoting *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir.1976).

"whenever anyone purchases anything, there is always a possible scenario under which they could have a financial loss."[970]

ii) Analysis and Conclusion

In applying the first prong of the *Howey* test, Arizona courts have required nothing more than what the prong states, an investment of money.[971] The record established that investors made monetary investments in the 59 income stream investments at issue.[972] Accordingly, the first prong of the *Howey* test is satisfied.

We note that our conclusion would not change if we were to adopt the approach of the Ninth Circuit in *Hector*, requiring the investor be subject to financial loss. The investment fulfillment kits and closing books included Disclosure of Risks Statements acknowledging that "Non-receipt of Scheduled Payment" could occur as a result of a seller's death or default.[973] The First Circuit approach in *SG Ltd.*, advocated by the ULG Respondents, also would not place the income stream investments outside the first prong of *Howey*. In *SG Ltd.*, the court found that the representation that investors "could firmly expect a 10% profit monthly … plainly supports the SEC's legal claim that participants who invested substantial amounts of money in exchange for virtual shares in the privileged company likely did so in anticipation of investment gains," which satisfied the first part of the *Howey* test.[974] Here, the purchase agreements specified an effective rate of return and aggregate value, providing investors with an expectation of a gain on their investments.[975] Accordingly, the income stream investments satisfy the first prong of the *Howey* test, regardless of the interpretation applied.

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[970] ULG Respondents Post-Hearing Br. at 25, FN 102.

[971] *See Rose v. Dobras*, 128 Ariz. 209, 211, 624 P.2d 887, 889 (App. 1981) ("In this case, there has clearly been an investment of money"); *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 565, 733 P.2d 1142, 1148 (App. 1986) ("[T]he first prong of the Howey test is met in the instant case. Plaintiff made an investment of money in Jackie"); *Vairo v. Clayden*, 153 Ariz. 13, 17, 734 P.2d 110, 114 (App. 1987) ("There is no question that Vairo invested money. Thus, the first prong of the *Howey* test is met").

[972] Exhs. S-42 at 3, S-79 at 4.

[973] *See, e.g.*, Exhs. S-21 at ACC000432, S-116 at ACC001511.

[974] *SG Ltd.*, 265 F.3d at 49.

[975] *See, e.g.*, Exhs. S-21 at ACC000409, S-116 at ACC001487.

b) Common Enterprise

i) Argument

The Division contends that the second element of the *Howey* test, common enterprise, has been met. The Division notes that, in Arizona, the common enterprise test may be met through a finding of either horizontal or vertical commonality.[976]

"A common enterprise exists when 'the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties.'"[977] A common enterprise will be found when either horizontal commonality or vertical commonality exists.[978] "Horizontal commonality requires a pooling of funds collectively managed by a promoter or third party" while "[v]ertical commonality requires a direct correlation between the success of the investor and the success of the promoter without a pooling of funds."[979]

In its Post-Hearing Brief, the Division contended that the income stream investments demonstrate both horizontal and vertical commonality.[980] In its Reply to the ULG Respondents Post-Hearing Brief, the Division withdrew its argument for the existence of horizontal commonality.[981] Accordingly, we consider only whether vertical commonality exists.

The Division cites the Arizona Court of Appeals in *Daggett* for the proposition that vertical commonality exists where a promoter's "interest does not end upon consummation of the purchase agreement."[982] The Division argues the existence of vertical commonality because ULG promoted[983] and participated in the investments for years as ULG acted as the escrow agent receiving veterans' monthly payment and retirement benefits and disbursing them to investors.[984] The Division notes that

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[976] Division Post-Hearing Br. at 31, citing *In the Matter of Concordia Financing Co., Ltd.*, ACC Decision No. 77088 at 182 (February 20, 2019); *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 566, 733 P.2d 1142, 1149 (App. 1987).

[977] *Vairo v. Clayden*, 153 Ariz. 13, 17, 734 P.2d 110, 114 (App. 1987) (quoting *S.E.C. v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 n. 7 (9th Cir.)).

[978] *Vairo*, 153 Ariz. at 17, 734 P.2d at 114.

[979] *Foy v. Thorp*, 186 Ariz. 151, 158, 920 P.2d 31, 38 (App. 1996).

[980] Division Post-Hearing Br. at 32-37.

[981] Division Reply to ULG Respondents Post-Hearing Br. at 4.

[982] *Daggett*, 152 Ariz. at 566, 733 P.2d at 1149.

[983] The Division cites Exhs. S-74 at ACC000336 (touting ULG as "Buyer's Legal Representation"), S-20 at ACC000327 (touting ULG as "independent counsel" engaged "[t]o further protect Buyers").

[984] The Division cites, e.g., Exh. S-116 at ACC001490-ACC001491 (Section 4: "The servicer of the Payments shall be Upstate Law Group, LLC"; Section 8: "Beginning at Closing, Seller [the veteran] shall receive the Payments at the designated escrow account at Upstate Law Group, LLC").

as the investors' attorney and escrow agent, ULG would continue receiving fees "for every year of escrowing after the second year."[985] As ULG's interest did not end upon the sale of a veteran's income stream to an investor, the Division contends that a common enterprise existed.[986]

The ULG Respondents argue that the Division has mischaracterized *Daggett*. The ULG Respondents note that *Daggett*'s discussion of the vertical commonality test cites *Brodt v. Bache & Co.*, 595 F.2d 459 (9th Cir. 1978). In *Brodt*, the Ninth Circuit found no vertical commonality because "the success or failure of Bache as a brokerage house does not correlate with individual investor profit or loss."[987] The ULG Respondents note that *Brodt* found the "Appellant's enterprise was a 'solitary' one. His profits were shared neither with other investors nor the appellee."[988] The ULG Respondents argue that *Daggett* found vertical commonality because the promoter's financial interest was tied to the success or failure of the investment, not the mere rendering of services for a fee as in *Brodt* or this case.[989] The ULG Respondents contend that the receipt of fees for continued services do not result in vertical commonality.

The Division counters that both ULG and PAC had interests that continued for the life of the investment. The Division notes that investors were told that ULG was their legal representative who

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[985] Exhs. S-87 at ACC002459, S-21 at ACC000436, S-26 at ACC001161.

[986] The Division also argues the existence of a common enterprise based on the investors' collective reliance upon the promoters' expertise. The "broad vertical commonality" test, adopted by the Fifth and Eleventh Circuits, finds that "a common enterprise exists when the fortuity of the investments collectively is essentially dependent upon promoter expertise." *In the Matter of Living Benefits Asset Mgmt., L.L.C.*, 916 F.3d 528, 536 (5th Cir. 2019). The ULG Respondents correctly note that this test differs from the vertical commonality test set forth in *Daggett* and applied in Arizona courts. *See Kaplan v. Shapiro*, 655 F. Supp. 336, 340-341 (S.D.N.Y. 1987) (comparing the "more restrictive" approach to vertical commonality, as first enunciated by the Ninth Circuit, requiring a direct relation between the success or failure of the promoter and that of his investors, with the broader interpretation of vertical commonality articulated by the Fifth Circuit). We are not aware of, and the parties have not cited to, any jurisdiction that has adopted both interpretations of vertical commonality. Our analysis of the vertical commonality test as enunciated in *Daggett* does not require us to consider the broad vertical commonality test and we decline to do so herein.

[987] *Brodt*, 595 F.2d at 461.

[988] *Id.* at 462.

[989] *Daggett* specifically held:

> [I]f plaintiff's investment was a success, Jackie would receive payment on the note for both the recourse and nonrecourse portions. However, in the event plaintiff's investment failed, at maturity Jackie would not receive payment on the nonrecourse portion of the note. Given such an event Jackie's only remedy would be foreclosure on its security interest in the art master. Thus, by virtue of the structure of the agreement, Jackie is inextricably interested in the success or failure of the plaintiff's investment. Therefore, since Jackie's interest does not end upon consummation of the purchase agreement, there exists a positive correlation between the success of the investor and the success of the promoter. Hence, a common enterprise does exist.

Daggett, 152 Ariz. At 566, 733 P.2d at 1149.

would "ensure[] all documentation [was] complete" and "'[p]erfect' the Buyer's security interest in the Seller's income."[990] The Division contends that ULG's role and interest continued for years as the parties' escrow agent, receiving veterans' monthly retirement and disability payments before disbursing monthly payments to the investors.[991] As the investors' attorney and escrow agent, ULG received an "advance fee for initial funding through the first two years of escrow period" with ULG continuing to receive fees "for every year of escrowing after the second year."[992] The Division contends that "there exists a positive correlation between the success of the investor and the success of the promotor"[993] because both ULG and the investor depended on the veteran to continue making monthly payments, otherwise the investor would not be paid and ULG would not receive its fees.

The Division contends that investors were informed that PAC would provide a guarantee to pay investors if the veterans stopped paying, i.e., the PAC Option. The Division notes that the Executive Summary given to all investors stated that:

> PAC purchases financial obligations and debt from the owners of those obligations and debt…. This purchase will be in the form of a Corporate Promissory Note that is guaranteed by PAC and paid in equal monthly payments over the remaining term of the original "Contract for Sale of Payments" agreement, or in the form of a lump sum payment made by PAC.[994]

The Division contends that for those investments with a PAC Option, the PAC Option created a common enterprise between PAC and the investors through vertical commonality: both had a shared interest in the continued payment by the veteran. The Division argues that after a default by the veteran, the PAC Option meant that the success of the income stream investment depended upon PAC making the remaining payments. Therefore, the investor and PAC both relied upon PAC's ability to maintain adequate monetary reserves to pay the investor. The Division notes that the investors suffered their

[990] Exh. S-74 at ACC000336.
[991] *See, e.g.*, Exh. S-116 at ACC001490-ACC001491.
[992] *See, e.g.*, Exh. S-87 at ACC002459.
[993] *Daggett*, 152 Ariz. At 566, 733 P.2d at 1149.
[994] Exh. S-76 at ACC000331.

losses when PAC failed.[995]

The Division further argues that the success of the investors and promotors also jointly depended on the anti-assignment issue being handled correctly. The Division argues that if the income stream investments were unlawful, the result would be failure for both the investors, whose investment would be worthless and unenforceable, and the promoters, whose income stream investment products would be worthless and unmarketable, which the promoters here addressed through fraudulent omissions in selling the product.

ii) Analysis and Conclusion

The Escrow Services and Fee Agreement provided for ULG to receive an annual fee for escrow services over the term of the income stream investment.[996] ULG had an ongoing financial interest in the success of the investment. If the veteran seller of the income stream investment stopped making monthly payments, then the investor would no longer receive payments and ULG would no longer be able to provide the escrow services for which ULG derived its fees.

The ULG Respondents equate ULG's receipt of fees in this case with the receipt of fees in *Brodt*. In *Brodt*, a brokerage house's registered representatives used their authorized discretion to finance commodities transactions with funds from the investor's account.[997] The question of whether a common enterprise existed was the crucial factor before the Ninth Circuit in *Brodt*.[998] The *Brodt* court noted that the brokerage house "could reap large commissions for itself and be characterized as successful, while the individual accounts could be wiped out."[999] The *Brodt* court found no common enterprise existed "since there is no direct correlation on either the success or failure side" and that "[m]erely furnishing investment counsel to another for a commission … does not amount to a common enterprise."[1000]

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[995] *See* Exh. S-27.

[996] *See, e.g.*, Exh. S-87 at ACC002549. "The one-time set-up up [sic] fee of $95.00 fee [sic] and two years of the $215.00 annual fee will be disbursed immediately to the Law Firm … The remainder of the fee shall remain in a trust account to be disbursed yearly in increments of $215.00 per year after the second year of escrowing."

[997] *Brodt*, 595 F.2d at 459-460.

[998] *Id.* at 460.

[999] *Id.* at 461.

[1000] *Id.* at 461, 462.

We distinguish the current case from *Brodt*. In *Brodt*, the brokerage house had no ongoing financial interest in any commodities transaction after the transaction closed. Conversely, ULG maintained an ongoing financial interest in the income stream investments by collecting escrow services fees over the life of the investment that, like the success of the investor, depended upon the veteran seller continuing to make monthly payments. Accordingly, we find that vertical commonality has been established and the second prong of the *Howey* test is satisfied.

c) Expectation of Profits from the Efforts of Others

i) Argument

The Division contends that the third element of the *Howey* test, expectation of profits through the actions of others, has been met. The Division contends that the investors expected to receive a modest return from the income stream investments.[1001] The Division argues that the third prong is met when "'the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.'"[1002] "[I]t is not necessary … that the efforts be those of the promoter."[1003]

The Division notes that Smith & Cox, in promoting and selling the BAIC and SoBell investments, made statements touting their expertise and skill:

> Andy Smith and Chris Cox create balanced financial strategies to protect and grow clients' wealth…. Smith is widely recognized as an expert on veterans' benefits…. After a combined 30 years in the financial services industry, the firm's founders have proven track records and a long list of financially secure and satisfied clients."[1004]

The Division notes that marketing materials for the BAIC and SoBell investments represented ULG as "Legal Representation" for the investors and stated that:

- Upstate Law Group, LLC of South Carolina is contracted by SMI to provide legal, escrow and payment services for the exclusive benefit

[1001] Tr. at 107, 170, 301-302, 421.
[1002] *Nutek Info. Sys., Inc. v. Arizona Corp. Comm'n*, 194 Ariz. 104, 108, ¶ 18, 977 P.2d 826, 830 (App. 1998) (quoting *S.E.C. v. Glenn W. Turner Enters. Inc.*, 474 F.2d 476, 482 (9th Cir. 1973)).
[1003] *Daggett*, 152 Ariz. at 566, 733 P.2d at 1149.
[1004] Exhs. S-139 at ACC006426, S-145 at ACC006537, S-169 at ACC016000.

of the Buyer and SMI.

- ULG provides a credit report and LexisNexis search report on each individual Seller and provides a transaction summary to the Buyer and SMI for review prior to closing.
- ULG ensures all documentation is complete and the purchased payments are directed to ULG's Trust Account prior to closing.
- ULG prepares and files a UCC-1 to "Perfect" the Buyer's security interest in the Seller's income.
- All Structured Income Asset monthly payments are processed in Upstate Law Group's Trust Accounts.[1005]

The Division notes that marketing materials for the PAC and FPD investments stated that "[t]o further protect Buyers, we engage independent counsel through [ULG] to review all of the supporting documentation in the closing book to ensure the due diligence process is completed as set out in the Buyer's Purchase Assistance Agreement."[1006]

The Division notes that the investors had a completely passive role in the investment: investors had no control over whether investments paid or not;[1007] investors had no management responsibilities;[1008] and investors did nothing more than invest their money.[1009] The Division contends that investors relied on ULG and others for the investments to succeed.[1010]

The ULG Respondents contend that the third prong of *Howey* is not met because there were no essential managerial efforts affecting the failure or success of a particular transaction, rather the transactions depended upon the particular seller's compliance with the terms of the Contract for Sale of Payments. The ULG Respondents cite two Arizona cases as guidance supporting their argument. In *Siporin*, the Arizona Court of Appeals held that Carrington's viatical settlement[1011] sales met the

[1005] Exhs. S-74 at ACC000336, S-138 at ACC006521.
[1006] Exh. S-20 at ACC000327.
[1007] Tr. at 107-108, 170-171, 332, 421.
[1008] Tr. at 107, 170.
[1009] Tr. at 107, 170.
[1010] *See, e.g.*, Tr. at 108-109, 421.
[1011] Viatical settlements were not expressly included in the Securities Act's definition of "security" at the time relevant to the actions in *Siporin*. *Siporin*, 200 Ariz. at 100, ¶17, 23 P.3d at 95.

third prong of *Howey*. The *Siporin* court cited the following factors in reaching this conclusion:

> In selecting life insurance policies to "viaticate," Carrington had to estimate the life expectancy of each prospective viator, which entailed reviewing medical records, gauging the truthfulness of the prospective viator's representation of his or her condition, and obtaining expert assistance to evaluate the prospective viator's medical condition. Carrington also had to review all potentially available medical treatments that might affect the prospective viator's life expectancy. More importantly, Carrington also obligated itself to investigate the prospective viator's life insurance policy to determine the actual death benefit payable and the likelihood that it would actually be paid in full. To do so, Carrington had to ensure that the policy was not contestable on any ground; that it was assignable; that it was not a group policy subject to cancellation with limited or nonexistent conversion rights; and that the insurance company's financial condition was such that it would be able to pay the death benefit when due.
>
> Once Carrington had completed its analysis, it negotiated an advantageous price at which it would purchase the prospective viator's life insurance policy. Thereafter, Carrington marketed fractional interests in the policy to the general public, and it undertook premium payment and monitoring services to keep the policy in force and to timely claim the death benefit on behalf of the investors. Although it is the viator's death that ultimately yields a return, the profitability of the return depends almost exclusively on the viatical seller's entrepreneurial pre-closing investigations, analyses, and negotiations in selecting the viator and the policy and in setting the terms on which the policy is

purchased.[1012]

The ULG Respondents contrast the holding in *Siporin* to that of *Foy*. *Foy* involved a real estate transaction where one of the original owners of the property, Mr. Foy, was the listing broker for the transaction and received a real estate commission.[1013] After the transaction, Mr. Foy "managed the property, disbursed net operating income, and maintained the property with a view to eventual resale."[1014] In holding that the third prong of *Howey* was not met, the *Foy* court found:

> The property's success or failure is controlled by its ability to attract tenants willing to pay rent. Although a particular property manager may marginally affect the success of commercial property, the manager's duties are generally routine, operational tasks that can be accomplished by any one of a number of competent property managers. No one property manager can be said to be essential to the success of the property. Nothing in the record supports a finding Foy was uniquely situated to manage this property. The success of the property is more likely attributable to its location, design, attractiveness, or numerous other characteristics of the property itself.[1015]

The ULG Respondents contend that, unlike the *Siporin* transactions, the income stream transactions differ as they required no specialized knowledge by any third party. The ULG Respondents argue that the escrow services and other tasks handled by third parties were, like *Foy*, routine, operational tasks that were not essential to the success of the transaction and could be performed by any competent manager.[1016] The ULG Respondents note that at least four separate companies served as the escrow company over the course of the transactions: First Reliant, then Security Title Agency, then ULG, and then a fourth company.[1017]

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[1012] *Siporin*, 200 Ariz. at 102, ¶¶ 23-24, 23 P.3d at 97.
[1013] *Foy*, 186 Ariz. at 153, 920 P.2d at 33.
[1014] *Id.*
[1015] *Foy*, 186 Ariz. at 158, 920 P.2d at 38 (internal citation omitted).
[1016] *See, e.g.*, Exhs. S-116 at ACC001496-ACC001499, S-119 at ACC000451-ACC000455, S-21 at ACC000417-ACC000421, S-26 at ACC001142-ACC001146.
[1017] *See* Exh. S-195a at ACC000297-ACC000298, ACC000342-ACC000343.

The ULG Respondents dispute the Division's contention that the investors had a passive role. The ULG Respondents argue that the buyers in the income stream investments, like the buyer in *Foy*, retained the right to take whatever action deemed necessary if the buyer became dissatisfied with any entity performing administrative tasks or if the seller failed to perform pursuant to the Contract for Sale of Payments.[1018] The ULG Respondents also argue that "[t]he Buyer, personally with the assistance of his/her professional advisor representative, must perform whatever due diligence he/she deems necessary regarding the Transaction, the documents, the risks and liquidity involved, and any other matters of concern to him/her – not only at the outset to determine whether the Transaction is appropriate for him/her, but also ongoing throughout the life of the Contract for Sale of Payments to determine if it is performing pursuant to the Contract for Sale of Payments."[1019]

The Division contends that investors' roles were passive and they relied on the essential managerial efforts of ULG, PAC, Smith & Cox, and the distributors. The Division argues that several essential managerial efforts affected the success or failure of each income stream investment: 1) it was essential that the investments be structured to avoid defaults and litigation costs or losses due to anti-assignment issues; 2) it was essential that the investments be structured to comply with securities regulation; 3) it was essential that the veterans be appropriately screened for creditworthiness before their income streams were offered as investments; 4) it was essential for the income stream investments

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[1018] Specifically, the *Foy* court found:

> Arizona courts have recognized a major component of the third prong is the level of control retained by the investor. Where the investor retains extensive control over the investment, the transaction is unlikely to be a security. In the present case, Thorp retained a large measure of control over her investment. Thorp retained the power to manage Broadriver Plaza herself, hire a third party manager, or hire Foy to manage the property. If at any time, Thorp became dissatisfied with her choice of property managers, she had the power to fire that manager and hire a replacement. The purchase of Broadriver Plaza was not inextricably linked to the management contract. Thorp's choice of Foy as manager does not convert an otherwise simple real estate transaction into a security.

Foy, 186 Ariz. at 158, 920 P.2d at 38 (internal citations omitted).

[1019] ULG Respondents Post-Hearing Br. at 32. The ULG Respondents cite A.A.C. R14-4-126(F)(2)(b) for the proposition that the professional knowledge of a Buyer's purchaser representative ("Smith, Cox, Smith & Cox, DeSimone, and any other Buyer professional advisor representative." ULG Respondents Post-Hearing Br. at 32, n111) is imputed to the Buyer. However, we note that the ULG Respondents proffer no argument and cite no evidence as to how the alleged representatives satisfy the numerous definitional requirements of a purchaser representative, as set forth in A.A.C. R14-4-126(B)(8), for any, let alone all, of the Buyers of the income stream investments. We further note that A.A.C. R14-4-126 "relates to transactions exempted from the registration requirements of A.R.S. §§ 44-1841 and 44-1842," meaning that the transactions would necessarily have to meet the definition of a security, otherwise they would not need to be exempted from Securities Act requirements. A.A.C. R14-4-126(A).

guaranteed by PAC that PAC be appropriately managed and funded to be a creditworthy guarantor.

The Division contends that ULG had an undeniably significant role as the investor's "Legal Representative" who ensured that all documentation was complete, implying to the investors that the transactions are legal and not prohibited by law such as the securities laws and the Federal Anti-Assignment Acts. The Division contends that ULG's role in "perfect[ing]" the buyer's interest by filing a UCC-1 was undeniably significant because the materials Smith & Cox provided to investors emphasized the investment's safety.[1020] The Division notes that the Executive Summary represented that this investment was "for Buyers who seek 'Secured' … long term income with above average returns" and that ULG's "[f]ormal legal agreements and filings create the Buyer's entitlement to the purchased Structured Income Asset and the Seller's formal obligations to pay."[1021] The Division contends that the buyer's receipt of payments was the central purpose of the investment and ULG's role in securing it was undeniably significant.

The Division contends that another of ULG's undeniably significant efforts was processing the veteran's monthly payments in ULG's trust account and sending them to the investor.[1022] The Division notes that ULG was retained "as a fiduciary escrow agent" for the income stream investments.[1023] The Division contends that ULG's escrow role was not merely a routine administrative task because entrusting a law firm with this role and routing payments through ULG's IOLTA account was intended to give investors a greater sense of protection.[1024]

The Division contends that PAC had an undeniably significant role as "Default Protection,"[1025] with the Executive Summary providing that "Buyers can purchase an Option from [PAC] to sell a defaulted Structured Income Asset for the outstanding principal value."[1026] The Division contends that "PAC's managerial efforts and business acumen were key because it needed to grow its business and build adequate reserves from which to pay investors, and for the 21 income stream investments that

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[1020] *See e.g.*, Exh. S-74 at ACC000334 ("Formal legal agreements and filings provide a 'Secured' monthly payment to the Buyer"), ACC000335 ("Formal contracts, a security agreement and a UCC-1 filing provide a 'Secured' legal entitlement to the Structured Income Asset to the Buyer").
[1021] Exh. S-76 at ACC000330.
[1022] Exh. S-74 at ACC000336.
[1023] Exh. S-87 at ACC002459.
[1024] Exh. S-195a at ACC000299-ACC000302.
[1025] Exh. S-74 at ACC000337.
[1026] Exh. S-76 at ACC000330.

included a PAC Option the investors had no control over those efforts."[1027] The Division further argues that PAC's ability to pay on the guarantees also depended on PAC, with ULG's assistance, correctly analyzing whether the income stream investments could lawfully be sold without securities registration, because a disruption to new income stream investments caused by securities enforcement would threaten PAC's financial position. The Division contends that even those investors who declined the PAC Option could rely on PAC's risks analysis efforts since PAC's willingness to offer a guarantee indicated PAC had judged the investment risks to be low.

In its Reply to the ULG Respondents Post-Hearing Brief, the Division restates the managerial efforts of Smith & Cox that were represented to investors. The Division cites testimony of Mr. Smith that he and his clients relied on the managerial efforts of ULG and others.[1028] The Division restates its position that the investors' roles were completely passive.

The Division argues that, contrary to the arguments of the ULG Respondents, *Siproin* demonstrates why the investors here relied on the efforts of others. The Division notes that the *Siporin* investment contracts involved viatical settlements, i.e. the sale of individual's life insurance policies at a discount. The Division contends that viatical settlements are similar to the income stream investments because both involve the investment of a lump sum in exchange for future payment or payments expected by the seller. The Division argues that the managerial efforts not performed by *Siporin* investors are analogous to the managerial efforts that the income stream investors relied upon others to perform. The Division notes that the defendant in *Siporin* had to ensure "that the insurance company's financial condition was such that it would be able to pay the death benefit when due,"[1029] while

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[1027] Division Reply to ULG Respondents Post-Hearing Br. at 9. The Division cites PAC Option documents in 21 income stream investments: Moreno Legacy Trust (Exh. S-21 at ACC000450-ACC000456); Moreno Legacy Trust (Exh. S-22 at ACC000551-ACC000557); Moreno Legacy Trust (Exh. S-23 at ACC000852-ACC000858); Michael D. Bradley (Exh. S-24 at ACC001003-ACC001009); Marion Jean Hoag (Exh. S-25 at ACC001095-ACC001101); Frances M. Schlack (Exh. S-26 at ACC001175-ACC001181); John McLeod (Exh. S-87 at ACC002540-ACC002544); John McLeod (Exh. S-88 at ACC002632-ACC002637); John McLeod (Exh. S-89 at ACC002740-ACC002745); John McLeod (Exh. S-90 at ACC003012-ACC003016); John McLeod (Exh. S-91 at ACC002830-ACC002835); Peter Smolar (Exh. S-103 at ACC004073-ACC004077); Peter Smolar (Exh. S-104 at ACC004294-ACC004298); Peter Smolar (Exh. S-105 at ACC004435-ACC004439); Peter Smolar (Exh. S-106 at ACC004503-ACC004507); Susan Hill (Exh. S-108 at ACC005185-ACC005189); Lois Zettlemoyer (Exh. S-112 at ACC003422-ACC003426); Lois Zettlemoyer (Exh. S-113 at ACC003095-ACC003099); Lois Zettlemoyer (Exh. S-114 at ACC003497-ACC003501); Lois Zettlemoyer (Exh. S-115 at ACC003578-ACC003582); Carolyn Strong (Exh. S-116 at ACC001530-ACC001533).

[1028] Tr. at 332-334.

[1029] *Siporin*, 200 Ariz. at 102, ¶ 23, 23 P.3d at 97.

similarly PAC and ULG performed due diligence on veterans for their creditworthiness and likelihood of fulfilling their obligations.[1030] The Division notes that the defendant in *Siporin* "had to ensure that the policy was not contestable on any ground [and] that it was assignable,"[1031] while similarly the distributor, PAC, and ULG had to determine that a veteran's income stream was valid and that the investment would not be an unlawful assignment. In *Siporin*, "[o]nce [the defendant] completed its analysis, it negotiated an advantageous price at which it would purchase the prospective viator's life insurance policy,"[1032] while similarly the distributors here negotiated with the veterans the price that an investor would pay for each income stream investment.[1033] The Division notes that the investors in *Siporin* were provided medical information about the viatical sellers but still relied on the defendant's underwriting efforts;[1034] similarly the income stream investors received credit report information about the veterans but still relied on the due diligence and screening efforts performed by PAC and ULG.[1035] The Division further notes that PAC did a proprietary risk assessment which was not shared with the investor, who had to trust the accuracy of PAC's risk assessment.[1036]

The Division argues that the ULG Respondents' contention, that the success of the investment depends on the veteran complying with the terms of the income stream investment, misses the point that the investors relied on the managerial efforts of ULG, PAC, and Smith & Cox to bring them creditworthy veterans with enforceable contracts. The Division cites the *Siporin* court that while "the viator's death … ultimately yields a return, the profitability of the return depends almost exclusively on the viatical seller's entrepreneurial pre-closing investigations, analyses, and negotiations in selecting the viator and the policy and in setting the terms on which the policy is purchased."[1037] The Division notes the similarity here: while the veteran's compliance yields a return, the profitability of the return depended on ULG, PAC, and the distributors' efforts to choose veterans who were likely to pay, analyze assignment issues so the investment issues would be enforceable, and negotiate profitable

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[1030] Exh. S-195a at ACC000273-ACC000274, ACC000305, ACC000319-ACC000320.
[1031] *Siporin*, 200 Ariz. at 102, ¶ 23, 23 P.3d at 97.
[1032] *Siporin*, 200 Ariz. at 102, ¶ 24, 23 P.3d at 97.
[1033] Exh. S-195a at ACC000317-ACC000318, ACC000339.
[1034] *See Siporin*, 200 Ariz. at 99, ¶ 6, 23 P.3d at 94.
[1035] Tr. at 332-333, 403-404.
[1036] Exh. S-195a at ACC000306-ACC000307.
[1037] *Siporin*, 200 Ariz. at 102, ¶ 24, 23 P.3d at 97.

terms. The Division concludes that the income stream investments here are analogous to the investment contracts in *Siporin*.

ii) Analysis and Conclusion

"[W]hen the investor is relatively uninformed and then turns over [his] money to others, essentially depending upon their representations and their honesty and skill in managing it, the transaction is generally considered to be an investment contract."[1038] "Substance controls over form when determining whether a financial arrangement constitutes an investment contract because the definition of a security embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[1039]

The income stream investments were marketed to potential investors by advertising the contributions of those involved. The BAIC and SoBell investment marketing materials represented that: Smith & Cox had skill and expertise in financial strategies and veterans' benefits; ULG provides legal, escrow and payment services; ULG provides a credit report and LexisNexis search report of the seller; ULG provides a transaction summary; ULG ensures all documentation is complete; ULG prepares and files a UCC-1 to "perfect" the investor's security interest; ULG processes monthly payments through the law firm's trust accounts. The PAC and FPD investment materials represented that ULG reviewed closing book documents to ensure due diligence was completed to protect the investors.

The success of the income stream investments relied upon essential managerial efforts including: the structuring of the investments to avoid defaults, litigation costs or losses due to anti-assignment issues; the screening of veterans for creditworthiness; and the appropriate management and funding of PAC to fulfill its obligation of default protection for those income stream investments it guaranteed.

We reject the ULG Respondents' contention that these tasks are routine or operational. Including the efforts of ULG and Smith & Cox in marketing materials demonstrated the value of these

[1038] *Rose*, 128 Ariz. at 213, 624 P.2d at 891 (internal quotation omitted).
[1039] *Siporin*, 200 Ariz. at 101, ¶ 20, 23 P.3d at 96 (internal quotation omitted).

services. Decisions regarding veterans' creditworthiness or the applicability of the Federal Anti-Assignment Acts would directly affect the success or failure of the investments.

We also reject the argument of the ULG Respondents that the investors were not passive but retained the right to take whatever action deemed necessary if dissatisfied or if the seller failed to perform. "The theoretical possibility that an investor would refuse the efforts of others is not fatal to a determination that profits are to be earned from third party efforts. The focus is on whether the typical investor would accept third party efforts."[1040] The record does not support a finding that the investors in the income stream investments had either the knowledge or the expertise to refuse the efforts of others. Furthermore, the argument that the investors retained ongoing control of the investments fails based on the economic realities of the services relied upon by the investors at the time of making the investment, namely determinations of creditworthiness of the veteran and the applicability of the Federal Anti-Assignment Acts, which directly led to the success or failure of the investment.

We note that, even were we to adopt the ULG Respondents' argument that each transaction's success relied only on the seller's compliance with the Contract for Sale of Payments, this argument does not defeat a finding that the income stream investments constituted investment contracts. "The efforts of others must be those which affect the failure or success of the investment. However, it is not necessary … that the efforts be those of the promoter."[1041] If, as the ULG Respondents argue, monthly payments by the seller pursuant to the Contract for Sale of Payments constitute the sole factor for success of the investment, each investor would by necessity rely upon the respective seller's financial management efforts not default. The investor would also rely upon the seller's determination that the Contract for Sale of Payments is an enforceable contract as opposed to an illegal assignment that the seller could disregard and cease payment. Therefore, the investors' reliance on the efforts of the sellers would also satisfy the third prong of the *Howey* test.

We conclude that the income stream investors had an expectation of profits to be attained through the efforts of others. All three prongs of the *Howey* test have been satisfied. Therefore, we

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[1040] *Daggett*, 152 Ariz. at 567, 733 P.2d at 1150 (internal citation omitted).
[1041] *Daggett*, 152 Ariz. at 566, 733 P.2d at 1149 (internal citation omitted).

find that the income stream investments were securities in the form of investment contracts.[1042]

2. Exemptions to Registration Requirements

The ULG Respondents argue that if the transactions are securities under the Securities Act, they are exempt from registration requirements. The ULG Respondents argue the applicability of exemptions pursuant to A.R.S. § 44-1844(A)(1) and Regulation D.[1043] The Division argues that no exemption from registration applies.

a) Non-Public Offering Exemption

i) Argument

The ULG Respondents contend that under A.R.S. § 44-1801(14), each individual seller in a Contract for Sale of Payments is the alleged issuer and the sale to a buyer, counseled by the buyer's professional advisor, would not be a public offering pursuant to A.R.S. § 44-1844(A)(1). The ULG Respondents note that each buyer is considered with "the purchaser's purchaser representative(s) [to determine if the purchaser] has such knowledge and experience in financial and business matters that the purchaser is capable of evaluating the merits and risks of the prospective investment."[1044] The ULG Respondents argue that the buyers, with professional advice from Mr. Smith, Smith & Cox, or Mr. DeSimone, had the knowledge and experience in financial and business matters making them capable of evaluating the merits and risks of the transactions.

The Division contends that the ULG Respondents have failed to prove that the Non-Public Offering Exemption, A.R.S. § 44-1844(A)(1), applies to any of the income stream investments at issue. Citing the United States Supreme Court's holding in *S.E.C. v. Ralston Purina Co.*, the Division argues that the Non-Public Offering Exemption only applies when the offerees can "fend for themselves," such as executive officers of the issuer, and do not need the protections of securities registration laws.[1045] "A court may only conclude that the investors do not need the protection of the [Securities Act of 1933] if all the offerees have relationships with the issuer affording them access to or disclosure

[1042] Having held the income stream investments are investment contracts, and therefore securities, we decline to consider the alternative arguments of the Division that the income stream investments are also evidences of indebtedness and notes.
[1043] The ULG Respondents also argue that the income stream investments are not notes, but if they are found to be notes, they are exempt from registration requirements under § 44-1844(A)(10). As we have made no finding regarding whether the income stream investments are notes, we do not consider this argument.
[1044] A.A.C. R14-4-126(F)(2)(b).
[1045] *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119, 125, 73 S. Ct. 981, 984, 97 L. Ed. 1494 (1953).

of the sort of information about the issuer that registration reveals"[1046] "The party claiming the exemption must show that it is met not only with respect to each purchaser, but also with respect to each offeree."[1047] "To claim the private offering exemption, evidence of the exact number and identity of all offerees must be produced."[1048]

The Division argues that the ULG Respondents bear the burden to prove strict compliance with all of the requirements of the Non-Public Offering Exemption.[1049] The Division contends that the ULG Respondents ignore or misapply the factors relevant to the Non-Public Offering Exemption: 1) the number of offerees, 2) the sophistication of the offerees, 3) the size and manner of the offering, and 4) the relationship of the offerees to the issuer.[1050] The Division contends that the ULG Respondents failed to meet their burden to prove for each of the 59 income stream investments either that there were no other offerees, or to prove the identity of those offerees. The Division argues that even if the ULG Respondents could prove there were no other offerees besides the investors, the ULG Respondents still would not have proven the exemption.[1051]

The Division contends, contrary to the argument of the ULG Respondents, that an investor's reliance on a representative suggests that the investor lacks the sophistication needed for the Non-Public Offering Exemption. The Ninth Circuit held in *Murphy* that "60 percent of the investors [having] used offeree representatives suggests at least that the majority of the purchasers, if not the majority of the offerees, lacked the sort of business acumen necessary to qualify as sophisticated investors."[1052]

The Division argues that while some of the income stream investments were relatively small in amount, the manner of the offering is consistent with a public offering because the income stream investments were offered "through the facilities of public distribution such as investment bankers or

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[1046] *S.E.C. v. Murphy*, 626 F.2d 633, 647 (9th Cir. 1980).
[1047] *Id.* at 645.
[1048] *W. Fed. Corp. v. Erickson*, 739 F.2d 1439, 1442 (9th Cir. 1984).
[1049] Citing A.R.S. § 44-2033 ("[W]hen a defense is based upon any exemption provided for in this chapter, the burden of proving the existence of the exemption shall be upon the party raising the defense"), *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980) ("Because of the vital public policy underlying the registration requirement, there must be strict compliance with all the requirements of the exemption statute").
[1050] *Murphy*, 626 F.2d at 644-645.
[1051] Citing *Murphy*, 626 F.2d at 645 ("[T]he number of offerees, itself, is not decisive").
[1052] *Murphy*, 626 F.2d at 646.

the securities exchanges."[1053] The Division notes that the income stream investments were promoted to the general public with securities or financial professionals such as licensed investment advisor Mr. Smith and Smith & Cox promoting the investments to their clients.[1054] The Division contends that the ULG Respondents failed to prove any relationship between the individual sellers and their offerees or investors, so the fourth factor is consistent with a public offering.

ii) Analysis and Conclusion

Pursuant to A.R.S. § 44-2033, the ULG Respondents bear the burden of proof to establish the applicability of an exemption. No Arizona authority interprets the Arizona Non-Public Offering Exemption, A.R.S. § 44-1844(A)(1), but we may take guidance from federal authority as the Arizona Non-Public Offering Exemption is identical to Section 4(a)(2) of the Securities Act of 1933, codified at 15 U.S.C. § 77d(a)(2).[1055] As noted by the Division, the Non-Public Offering Exemption exempts only those offerings where the offerees do not need the protections of a securities registration statute. The test for the federal Non-Public Offering Exemption focuses on: 1) the number of offerees, 2) the sophistication of the offerees, 3) the size and manner of the offering, and 4) the relationship of the offerees to the issuer.[1056] As noted by the Division, the party claiming the Non-Public Offering Exemption must prove that it is met not only as to each purchaser, but with respect to each offeree. "Such proof must be explicit, exact, and not built on conclusory statements."[1057]

The ULG Respondents rely on two arguments to claim the Non-Public Offering Exemption: that each Contract for Sale of Payments was between an individual seller and individual buyer, and that the buyers were all sophisticated investors through their purchaser representatives. The record does not reveal the number, identity, or the sophistication of all offerees of the income stream investments at issue because there has been no evidence presented that these particular income stream investments were not offered to others prior to being sold to the investors. The record also does not demonstrate a relationship between any of the sellers of the income stream investments with the investors, let alone

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[1053] *Id.* (citation omitted).
[1054] Tr. at 298, Exh. S-20 at ACC000326.
[1055] *See* Laws 1996, Ch. 197, § 11(C) (Legislature intends that court interpretations of substantially similar federal securities provisions be used as interpretive guide for the Securities Act).
[1056] *Murphy*, 626 F.2d at 644-645.
[1057] *Johnston v. Bumba*, 764 F. Supp. 1263, 1273 (N.D. Ill. 1991) (internal quotation omitted).

any unidentified offerees. The ULG Respondents have not presented adequate evidence to meet their burden of proof to establish applicability of the Non-Public Offering Exemption.

b) Regulation D

i) Argument

The ULG Respondents also argue that if the income stream investments were securities, "due to the small size and single transaction between each buyer and seller, each Transaction would also have satisfied the requirements of Reg D and AZ Reg D even without filing a Form D Notice."[1058]

The Division contends that the ULG Respondents failed to prove that the income stream investments were exempt from registration under federal Regulation D Rule 506(b) or under Arizona's Limited Offering Exemption. The Division argues that there is no evidence that the investors were accredited investors or met the standards of a sophisticated investor as the exemptions require.[1059] The Division argues that while having a purchaser representative can satisfy the sophisticated investor requirements, the ULG Respondents failed to prove that any investor had a purchaser representative within the meaning of the exemptions. The Division notes that both exemptions define the term purchaser representative with several requirements, including: a written acknowledgement by the investor that the representative is the investor's purchaser representative in connection with evaluating the merits and risks of the prospective investment,[1060] and written disclosure to the investor by the purchaser representative of any compensation received or to be received.[1061] The Division notes that there is no evidence that any of the investors made a written acknowledgement of purchaser representative. The Division further notes that the investors' sales agents received commissions for selling the income stream investments but there is no evidence of written disclosure of those communications to the investors.[1062] Therefore, the Division concludes that the sales agents were not purchaser representatives who could satisfy investor sophistication requirements for the exemptions. The Division further notes that there is no evidence that the individual issuer-sellers provided the non-accredited investors with an audited balance sheet, a requirement of the Limited Offering

[1058] ULG Respondents' Br. at 42.
[1059] Citing 17 C.F.R. § 230.506(b)(2)(ii); A.A.C.R14-4-126(F)(2)(b).
[1060] 17 C.F.R. § 230.501(i)(3); A.A.C.R14-4-126(B)(8)(c).
[1061] 17 C.F.R. § 230.501(i)(4); A.A.C.R14-4-126(B)(8)(d).
[1062] Exhs. S-41 at 85, S-134.

Exemption.[1063]

ii) Analysis and Conclusion

Federal Regulation D, and the corresponding Arizona rules, provide a safe harbor exemption from registration requirements for limited offerings. An exemption under Regulation D, (Rule 504, Rule 505,[1064] or Rule 506) and the corresponding Arizona rules is conditioned upon the satisfaction of general conditions regarding integration of sales, information requirements, limitations on the manner of offering, and limitations on resale.[1065] Rule 506, and its Arizona counterpart, further impose a limit of thirty-five purchasers who are not accredited investors, or reasonably believed by the issuer to be accredited investors.[1066] These purchasers, alone or with their purchaser representative, must be sophisticated purchasers.[1067]

The ULG Respondents make no assertion as to specifically which of the Regulation D rules, and Arizona counterparts, create an exemption for the income stream investments. The ULG Respondents make no contentions and cite no evidence as to how they believe the income stream investments satisfy information requirements, limitations on the manner of offering, or limitations on resale. The ULG Respondents contend that the investors were sophisticated through their use of purchaser representatives, namely Mr. Smith, Smith & Cox, and/or Mr. DeSimone. However, the ULG Respondents make no contentions and cite no evidence as to how they believe Mr. Smith, Smith & Cox, and/or Mr. DeSimone satisfy the definitional requirements of a purchaser representative.[1068] The ULG Respondents have not presented sufficient evidence to meet their burden of proof to establish the applicability of an exemption under Regulation D and the corresponding Arizona rules.

C. Within or from Arizona

The Division contends that the Respondents offered or sold securities "within or from this state," an element of violations of A.R.S. §§ 44-1841, 44-1842, and 44-1991(A). The Division contends that the phrase "from this state" includes transactions which do not occur entirely inside

[1063] A.A.C. R14-4-126(C)(2)(b)(ii).
[1064] 17 C.F.R. § 230.505 was repealed effective May 22, 2017. 81 Fed. Reg. 83,553 (Nov. 21, 2016).
[1065] 17 C.F.R. §§ 230.502, 230.505(b)(1), 230.506(b)(1), A.A.C. R14-4-126(C).
[1066] 17 C.F.R. §§ 230.501(e)(1)(iv), 230.506(b)(2)(i), A.A.C. R14-4-126(B)(5)(a)(iv), A.A.C. R14-4-126 (F)(2)(a).
[1067] 17 C.F.R. § 230.506(b)(2)(ii), A.A.C. R14-4-126(F)(2)(b).
[1068] 17 C.F.R. § 230.501(i), A.A.C. R14-4-126(B)(8).

Arizona.[1069] The Division contends that the Securities Act's "within or from" language includes: 1) unlawful sales directed from other states to Arizona residents;[1070] 2) unlawful sales directed from Arizona to residents of other states;[1071] and 3) unlawful intrastate sales to Arizona residents.[1072]

The Division contends that Mr. Smith and Smith & Cox operated within and from Arizona. Mr. Smith and Smith & Cox sold the 53 BAIC and SoBell investments to both Arizona and non-Arizona residents. Mr. Smith has lived in Arizona since 2007.[1073] Smith & Cox is an Arizona limited liability company.[1074] Since 2009, the Commission has licensed Smith & Cox as an investment advisor and Mr. Smith as an investment advisor representative.[1075] The Division concludes that each of the 53 BAIC and SoBell investments was sold "within or from" Arizona.

The Division contends that Mr. DeSimone operated within and from Arizona. The six PAC and FPD investments were sold to four Arizona residents.[1076] The salesman for these investments was Mr. DeSimone,[1077] who has lived in Arizona since 1988.[1078] Mr. DeSimone has been an Arizona-licensed insurance agent.[1079] The Division concludes that each of the six PAC and FPD investments was sold "within or from" Arizona.

The Respondents do not challenge the Division's contention that the income stream investments were offered or sold in or from Arizona. The Division has established that the securities at issue were sold "within or from this state," as required to find a violation under A.R.S. §§ 44-1841, 44-1842, and 44-1991(A).

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[1069] *Chrysler Capital Corp. v. Century Power Corp.*, 800 F. Supp. 1189, 1191 (S.D.N.Y. 1992) (interpreting the Arizona Securities Act).

[1070] *See R & L Ltd. Investments*, 729 F. Supp. 2d at 1113–14 (offer and sale of a Georgia-based real estate investment to an Arizona resident was "within or from" Arizona).

[1071] *Shorey v. Arizona Corp. Comm'n*, 238 Ariz. 253, 258, ¶ 16, 359 P.3d 997, 1002 (App. 2015).

[1072] *State ex rel. Corbin v. Goodrich*, 151 Ariz. 118, 122, 726 P.2d 215, 219 (App. 1986).

[1073] Tr. at 288, 291.

[1074] Exh. S-61 at ACC006038-ACC006039.

[1075] Exhs. S-58, S-59.

[1076] Exhs. S-21 at ACC000411, S-22 at ACC000511, S-23 at ACC000812, S-24 at ACC000961, S-25 at ACC001056, S-26 at ACC001136.

[1077] *See* Tr. at 524-525; Exh. S-42 at 2 of 3.

[1078] Tr. at 523.

[1079] Tr. at 523-524.

D. Attachment of Liability to the Respondents

Pursuant to A.R.S. § 44-2003(A), the Act provides for joint and several liability against any person who made, participated in or induced the unlawful sale or purchase of a security.[1080] The Arizona Supreme Court has considered A.R.S. § 44-2003(A) to contain "sweeping language of inclusion."[1081] In applying A.R.S. § 44-2003(A), the word "participate" has been found to mean "'to take part in something (an enterprise or activity) … in common with others,' or 'to have a share or part in something.'"[1082] The Arizona Court of Appeals has found that, under A.R.S. § 44-2003(A), "induce may indicate overcoming indifference, hesitation, or opposition, usu[ally] by offering for consideration persuasive advantages or gains that bring about a desired decision."[1083] "[O]ne may simultaneously induce and participate in an illegal sale."[1084] The Division argues that the Respondents are subject to liability under A.R.S. § 44-2003(A).

1. PAC and Michelle Plant

a) Argument

Ms. Plant contends that "PAC only offered a debt arbitrage option/service in connection with some (but not all) contracts."[1085] Ms. Plant argues that PAC did not offer the income stream investment product and she, in her position with PAC, did not need to be licensed in securities.

Ms. Plant contends that the income stream investments were arm's length transactions between the buyers and sellers to which neither PAC nor she was a party.[1086] Ms. Plant argues that the Purchase Assistance Agreement states that PAC does not provide legal, tax, financial or other advice to the buyers.[1087] Ms. Plant further notes that the testimony of the investors indicates they did not speak to or rely on advice from Ms. Plant or PAC and that Mr. DeSimone and Mr. Smith also testified to not having spoken with her prior to the hearing.[1088]

[1080] A.R.S. § 44-2003(A).
[1081] *Grand v. Nacchio*, 225 Ariz. 171, 174, ¶ 18, 236 P.3d 398, 401 (2010).
[1082] *Id.* at 175, ¶ 21, 236 P.3d at 402, citing *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 21, 945 P.2d 317, 332 (App. 1996), as corrected on denial of reconsideration (Jan. 13, 1997).
[1083] *Standard Chartered*, 190 Ariz. at 21-22, 945 P.2d at 332-333.
[1084] *Grand*, 225 Ariz. at 175, ¶ 22, 236 P.3d at 402.
[1085] Plant Post-Hearing Br. at 48.
[1086] Exh. S-171 at ACC002371.
[1087] *See, e.g.*, Exh. ULG-5 at 28, 49 of 101.
[1088] Tr. at 144, 200, 259-260, 360-361, 440, 481, 567.

The Division counters that PAC sold both the contracts for the assignment of military pension and the PAC Options to purchase defaulted structured assets. The Division notes that the fulfillment kits for five transactions between March and May of 2017 all contain a document titled "Performance Arbitrage Company, Inc. Structured Asset Purchase Application" in which the investor agrees to purchase an income stream investment.[1089] These five fulfillment kits all also contain a Purchase Assistance Agreement between the investor and PAC whereby PAC holds the right to accept a purchase offer for the income stream investment on behalf of the veterans.[1090]

The "Performance Arbitrage Company, Inc. Structured Asset Purchase Application" stated that "[t]he Payments to be purchased pursuant to this Purchase Application are described as follows" and provided the key details of the investment including the payment obligor, the payment period, the start and end dates, the payment amount, the purchase price, the aggregate value, the effective rate of return, and the distribution channel.[1091]

The Division contends that Ms. Plant and PAC induced the sales of income stream investments because their role was advertised to investors to persuade them to invest. Marketing documents advertised that PAC vetted the financial ability of the sellers to meet their commitments and offered the PAC Option to make payments and purchase a defaulting income stream investment.[1092] The Division contends that marketing PAC's involvement in this way induced sales by communicating a reduction of risk to the investors. The Division notes that this effect on investors was demonstrated by the testimony of Ms. Schlack and Mr. DeSimone who felt the involvement of PAC provided added protection to the investment.[1093] The Division argues that the PAC Option was offered to make the investment safer to investors.[1094] The Division contends that Ms. Plant's signature on the PAC Option meant that PAC had reviewed the income stream investment, approved it with PAC's more stringent standards, and PAC was willing to secure the investment with a promissory note on default.

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[1089] Exhs. S-21 at ACC000409, S-22 at ACC000509, S-23 at ACC000810, S-25 at ACC001054, S-26 at ACC001134.
[1090] Exhs. S-21 at ACC000427, S-22 at ACC000528, S-23 at ACC000829, S-25 at ACC001073, S-26 at ACC001152.
[1091] Exhs. S-21 at ACC000409, S-22 at ACC000509, S-23 at ACC000810, S-25 at ACC001054, S-26 at ACC001134.
[1092] *See, e.g.*, Exh. S-20 at ACC000331.
[1093] Tr. at 4469-470, 563.
[1094] Exh. S-195a at ACC000305.

The Division argues that the Commission may infer PAC was aware of the marketing of its services because PAC performed them as advertised. The Division further contends that it is implausible PAC shared common ownership with the promoters and relied on the promoters to offer the PAC Option without being aware that the promoters were advertising the role that PAC performed for the investors. The Division also argues that it is implausible Ms. Plant could act as the COO of PAC, the Director of Compliance for BAIC, contract employee for SoBell, and liaison between PAC and the promoters without being aware of the promoters advertising PAC's role.

The Division contends that Ms. Plant participated in the unlawful sale of the income stream investments and PAC Options under A.R.S. § 44-2003(A). The Division notes that Ms. Plant admitted her involvement in reviewing and approving PAC Options.[1095] The Division notes that Ms. Plant reviewed and approved the PAC Option agreements in all six income stream investments at issue.[1096] Ms. Plant admitted that she was responsible for reviewing the closing books to ensure accuracy and enforceability.[1097] The Division further notes that PAC Options were issued only in connection with the income stream investments.

The Division contends that when an investor requested the PAC Option, PAC and Ms. Plant performed a comprehensive review of the seller to ensure ability to make monthly payments.[1098] The Division argues that, for this review and associated PAC Option, PAC charged the investor between 12 and 15.5%[1099] of the investment sale price, and Ms. Plant received a salary.[1100] The Division concludes that Ms. Plant took part or had a share in the unlawful sale of the income stream investments by offering the PAC Option, performing a thorough review of the seller, signing the PAC Option, and financially benefitting from the unlawful sale of the income stream investments.

b) Analysis and Conclusion

The record established that PAC's role in the six income stream investments was advertised in marketing materials. The weight of the evidence established that PAC and Ms. Plant were aware of

[1095] Exh. S-171 at ACC002376.
[1096] Exhs. S-21 at ACC000456, S-22 at ACC000557, S-23 at ACC000858, S-24 at ACC001009, S-25 at ACC001101, S-26 at ACC001181.
[1097] Exh. S-171 at ACC002376.
[1098] Exhs. S-20 at ACC000331, S-171 at ACC002376.
[1099] *See, e.g.*, Exhs. S-89 at ACC002740, S-21 at ACC000453.
[1100] *See* Exh. S-171 at ACC002376.

PAC's appearance in promotional materials for the income stream investments. The record established that the description of the PAC Option and PAC's role in marketing materials gave confidence to investors as well as Mr. DeSimone, who offered the investment to his clients. Accordingly, we find that PAC and Ms. Plant induced the unlawful sale of securities under A.R.S. § 44-2003(A).

All six of the relevant income stream investments contained a PAC Option. The evidence of record established that the PAC Option was a product sold and marketed exclusively as a component of the income stream investments, pursuant to which Ms. Plant and PAC vetted the seller and reviewed the accuracy and completeness of the closing book. We find PAC and Ms. Plant "took part … with others" in the income stream investments. PAC and Ms. Plant further "had a share or part" in the income stream investments as PAC was paid directly from the investment funds and Ms. Plant received a salary from PAC. As such, we find that PAC and Ms. Plant participated in the unlawful sale of securities under A.R.S. § 44-2003(A).

2. ULG and Candy Kern-Fuller

a) Argument

The Division contends that ULG participated in the investments by, among other things, receiving fees of at least $48,695.62.[1101]

The ULG Respondents contend that ULG has not "made, participated in or induced" the sale or purchase of the income stream investments. The Arizona Court of Appeals has held that:

> the words "made, participated in or induced" must be read:
>
> (i) to require more than some collateral involvement in a securities transaction, because § 1991 already requires that any misstatement be made "in connection with" a securities transaction; and
>
> (ii) to require more than that the misstatements merely had the effect of influencing a buyer to make a sale, because § 1991 already requires that any false statements be "material," i.e., that it "assume actual significance in deliberations of the reasonable buyer."[1102]

[1101] Exh. S-134 at 4 of 4.

[1102] *Standard Chartered*, 190 Ariz. at 22, 945 P.2d at 333 (citation omitted).

The ULG Respondents contend that performing professional services, and being paid for those services, without actively soliciting a purchase of the underlying security is insufficient conduct and financial incentive for liability under A.R.S. § 44-2003(A).[1103] The ULG Respondents quote *Standard Chartered*, arguing that inducement requires a "purposeful persuasive effort" and that liability should not extend to "any outsider to a securities transaction … who provided information that foreseeably contributed to, and thereby *influenced*, a buyer or seller's decision to engage in the transaction."[1104] The ULG Respondents contend that ULG had no financial incentive to accomplish sales other than the fee for their professional services and ULG did not engage in any purposeful persuasive efforts to promote sales of the transactions. The ULG Respondents note that the buyers and advisor-representatives testified that they had not talked, met or communicated with ULG before entering the transactions.[1105] The ULG Respondents further note that the Division's investigator did not uncover any information that suggested ULG sold or promoted the transactions.[1106] The ULG Respondents contend that ULG was engaged: (1) prior to the closing of the transaction as an attorney to provide limited legal services pursuant to a Legal Services and Fee Agreement with the distributors, specifically providing that ULG was not engaged to provide securities advice or tax advice, and the engagement would end with the final closing, the UCC filing, and verification of the appropriate insurance issuance; and (2) after the closing of the transaction as an escrow company providing escrow services pursuant to Escrow Services and Fee Agreements with each buyer. The ULG Respondents contend that, like the accounting firm in *Standard Chartered*, ULG played no role in marketing the transactions, but provided professional services tangentially related to the sales. The ULG Respondents argue that performing professional services for a fee does not give ULG a stake in the sale of transactions to cause them to have participated in or induced the sales pursuant to A.R.S. § 44-2003(A).

. . .

[1103] Citing *Standard Chartered*, 190 Ariz. at 22, 945 P.2d at 333 (accounting firm not liable under § 44-2003(A) notwithstanding being paid for professional services); *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 537 n.5 (9th Cir. 1989) ("merely performing professional services, without actively soliciting a purchase of the underlying securities, does not give rise to liability").

[1104] *Standard Chartered*, 190 Ariz. at 21, 22, 945 P.2d at 333, 334 (emphasis in original).

[1105] Tr. at 109, 134 (Ms. Strong), 188 (Mr. Hebb), 250 (Ms. Hill), 345-347, 353, 361, 386-387 (Mr. Smith), 430-432 (Mr. Zimmerman), 470 (Ms. Schlack), 548 (Mr. DeSimone).

[1106] Tr. at 662.

In its Reply to the ULG Respondents Post-Hearing Brief, the Division argues that ULG and Ms. Kern-Fuller induced the sales of the income stream investments as the marketing materials touted ULG's role, as performed by Ms. Kern-Fuller, to persuade investors to invest. The Division cites a marketing document from 2016:

> To further protect Buyers, we engage independent counsel through Upstate Law Group, LLC ("ULG") to review all of the supporting documentation in the Closing Book to ensure the due diligence process is completed as set out in the Buyer's Purchase Assistance Agreement. Additionally, the utilization of ULG for closing the transactions and servicing the ongoing payments ensures a Buyer's funds are always in the hands of an insured escrow agent.[1107]

The Division further cites a 2014 marketing document stating that ULG is engaged "to ensure the documentation for this transaction is accurate and complete" and that ULG "provides Seller's background history and credit report to both [distributor] and the Buyer for review."[1108] The Division further contends that ULG and its IOLTA account were chosen as the escrow service to help persuade investors.[1109]

The Division argues that marketing ULG's involvement encouraged investors, including Mr. Hebb[1110] and Mr. Zimmerman[1111] to make investments as they would benefit from a law firm working on their behalf. The Division contends that ULG and Ms. Kern-Fuller's involvement encouraged Mr. Smith[1112] and Mr. DeSimone[1113] to solicit their clients with the income stream investments, thereby inducing sales to all the investors in this case.

The Division contends that the Commission can infer that ULG and Ms. Kern-Fuller were aware that the marketing materials advertised ULG's role in the income stream investments because

[1107] Exh. S-20 at ACC000327.
[1108] Exh. S-75 at ACC005825.
[1109] Exh S-195a at ACC000299-ACC000302.
[1110] Tr. at 167, 171.
[1111] Tr. at 411.
[1112] Tr. at 314, 317-318, 334, 374, 386.
[1113] Tr. at 537, 552-553.

ULG performed the tasks as advertised: ULG provided credit report information to investors;[1114] ULG prepared and filed UCC-1 forms;[1115] seller's payments were directed to ULG's IOLTA account before closing;[1116] and ULG revised disclosure documents given to investors, making them "superficially complete enough" to close the transaction though not complete enough to adequately disclose the risks to the investors.[1117] The Division contends that the Commission can also infer that Ms. Kern-Fuller and ULG were aware of the marketing materials because the Commission may make adverse inferences from Ms. Kern-Fuller's testimony asking if she was aware of marketing materials as early as 2014 and discussed them with Mr. Gamber.[1118]

The Division further contends that the Commission can infer that Ms. Kern-Fuller and ULG were aware of the marketing materials because of the close relationship between ULG and the income stream investment promoters as evidenced by: ULG reviewing the templates for all closing book documents;[1119] ULG disclaiming securities advice in the agreement with distributors but omitting this disclaimer in the engagement agreement with investors, thereby supporting the marketing strategy of not mentioning securities to investors;[1120] Mr. Smith's testimony that Ms. Kern-Fuller and representatives of the promoters seemed very close and greeted each other with hugs at a meeting.[1121] The Division concludes that it would be implausible for ULG to have worked so closely with the promoters of the income stream investments without being aware that the promoters advertised ULG's role to investors.

The Division also argues that ULG and Ms. Kern-Fuller participated in the unlawful securities sales. The Division contends that ULG and Ms. Kern-Fuller met the "have a share or part in something" portion of the definition of participation because ULG was entitled to a share of the investment proceeds. Pursuant to the Purchase Assistance Agreements, investors would pay the investment

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[1114] Exhs. S-102 at ACC002181, S-107 at ACC002241-ACC002242, S-109 at ACC005271, S-118 at ACC001337.
[1115] Exhs. S-133 (all 30 closing summaries identify UCC fees), S-189 at ACC003093 (email from Ms. Kern-Fuller to Mr. Gamber stating that ULG closes case and makes UCC filing), ULG-75 at 1 of 9, ¶ 2 (ULG's engagement agreement with distributors includes UCC filing fee).
[1116] *See, e.g.*, Exhs. S-21 at ACC000443-ACC000445, S-81 at ACC004738-ACC004739.
[1117] Exh. S-195a at ACC000289-ACC000290.
[1118] Tr. at 1056-1057.
[1119] Exh. S-195a at ACC000286, ACC000294-ACC000295.
[1120] *Compare* ULG-75 at 2 of 9, ¶ 6, *with* ULG-76 at 3 of 4, ¶ 5.
[1121] Tr. at 390-391.

purchase price (the investment proceeds) to ULG,[1122] from which ULG directly took its fees.[1123] The Division contends that ULG's fees arose from the work performed by Ms. Kern-Fuller. The Division contends that ULG had a financial interest in the amount of the income stream investments because ULG was entitled to a larger fee based on the size of the investment.[1124]

The Division contends that ULG and Ms. Kern-Fuller also met the "take part in something with others" definition of participation because they "worked with the distributors, PAC, the veterans, and the investors in several ways that were central to the income stream investments."[1125] The Division argues that ULG and Ms. Kern-Fuller acted as the central bankers for the income stream investment enterprise:[1126] ULG received investment proceeds from the investors which it divided between the veterans, itself, and third parties;[1127] and ULG received investment returns from the veterans which it paid to the investors[1128] The Division contends that since the investment proceeds and returns were commingled in ULG's IOLTA account, ULG was responsible for important bookkeeping, pursuant to South Carolina Appellate Court Rules, Rule 417.[1129] The Division argues that as a law firm, ULG's role as central banker projected a greater level of protection than a simple escrow service and that the use of the IOLTA account was significant to both Mr. Smith and Mr. DeSimone.[1130] The Division notes that ULG also acted as the "enforcer" by bringing collections cases against veterans.[1131]

The Division contends that ULG and Ms. Kern-Fuller gave legal advice that shaped the terms and substance of the income stream investments: ULG and Ms. Kern-Fuller advised Mr. Gamber that the income stream investments were not securities, allowing the unlawful sales to continue;[1132] ULG and Ms. Kern-Fuller were responsible for reviewing templates for all closing book documents and directing changes,[1133] including changes made by Ms. Plant as directed by Ms. Kern-Fuller;[1134] and

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[1122] *See, e.g.*, Exhs. S-21 at ACC000427, S-80 at ACC004770.
[1123] Exh. S-133.
[1124] Exh. ULG-75 at 1 of 9, ¶ 2.
[1125] Division ULG Reply Br. at 23.
[1126] Exh. S-46 at 11-12; Tr. at 811.
[1127] Exhs. S-133, ULG-75 at 1 of 9, ¶ 2.
[1128] *See, e.g.*, Exhs. S-21 at ACC000413, S-90 at ACC002847.
[1129] Tr. at 811-812.
[1130] Tr. at 334, 537; Exh. S-195a at ACC000299-ACC000302.
[1131] Exh. S-195a at ACC000370; *see also* Exhs. S-48, S-51, S-52.
[1132] Exh. S-195a at ACC000277.
[1133] Exh. S-195a at ACC000286, ACC000294-ACC000295.
[1134] Exh. S-195a at ACC000290-ACC000291.

ULG and Ms. Kern-Fuller were responsible for the closing book's risk disclosures to investors, which they were involved in changing.[1135] The Division notes that while the ULG Respondents argue that the closing documents were drafted by in-house attorneys, there is no evidence in the record contrary to Ms. Plant's CFPB testimony that ULG and Ms. Kern-Fuller were responsible for changes to those documents. The Division contends that ULG and Ms. Kern-Fuller further shaped the income stream investments by performing risk assessments on the veterans and making recommendations on their suitability.[1136] The Division notes that ULG's agreement with the distributors stated that a transaction is not closed until "all documents are complete and [ULG] has approved the sale for funding," giving ULG final approval of all the income stream investments.[1137] The Division notes Professor Freeman's testimony that, in his opinion, ULG and Ms. Kern-Fuller participated in the income stream investments.[1138]

The Division distinguishes ULG and Ms. Kern-Fuller from the accounting firm in *Standard Chartered*. The *Standard Chartered* accounting firm annually audited a bank for years, providing information on the bank's financial condition to the bank and third parties.[1139] The bank was acquired through a stock sale where the acquiring company relied upon the firm's most recent audit, but expert testimony found the firm failed to follow generally accepted auditing standards and financial statements overstated the bank's income.[1140] The Arizona Court of Appeals held that the accounting firm did not participate in the stock sale because:

> [The firm's] function – to issue audit opinions about [the bank's] financial status – did not differ from the function it would have performed had no merger or sale been in process. And though [the firm] made its audit opinions available to [the bank], it is uncontradicted that [the firm] had no stake in the sale. [The firm] provided its opinions to [the bank] because it was asked to do so by its audit client and because

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[1135] Exh. S-195a at ACC000289, s*ee, e.g.*, Exhs. S-21 at ACC000432-ACC000435, S-80 at ACC004776-ACC004778.
[1136] Exh. S-195a at ACC000273-ACC000274.
[1137] Exh. ULG-75 at 1 of 9, ¶ 2.
[1138] Tr. at 809-826.
[1139] *Standard Chartered*, 190 Ariz. at 13, 945 P.2d at 324.
[1140] *Id.* at 14, 945 P.2d at 324.

it wished to continue as [the bank's] auditor after the sale.[1141]

The *Standard Chartered* court further refers to the accounting firm as a "collateral actor[] … remote from the transaction, who neither financially participate[d], nor promote[d] or solicit[ed] the transaction, but merely provide[d] information that contribute[d] to a buyer or seller's decision to close the deal."[1142]

The Division distinguishes the accounting firm in *Standard Chartered*, whose annual audit was routine and unchanged by the stock sale process, from ULG and Ms. Kern-Fuller, whose work was conducted exclusively for income stream investment sales: Ms. Kern-Fuller advised Mr. Gamber that the income stream investments were not securities;[1143] ULG and Ms. Kern-Fuller acted as "gatekeepers"[1144] by making risk assessments as to which veterans should be accepted as sellers;[1145] ULG and Ms. Kern-Fuller drafted the investment documents and directed the flow of all investment funds.[1146] The Division argues that the work of ULG and Ms. Kern-Fuller was not collateral, but rather their revising the closing book documents and acting as the central banker allowed the income stream investments to be sold. The Division contends that ULG and Ms. Kern-Fuller did not merely provide information, but they were responsible for the transactional documents and the legal validity of the transactions. The Division concludes that "ULG and Ms. Kern-Fuller were the key legal advisors, gatekeepers, central bankers, and enforcers for the entire income stream investment enterprise, and that made them participants."[1147]

b) Analysis and Conclusion

The record established that ULG's role in the income stream investments was advertised in marketing materials. The weight of the evidence established that ULG and Ms. Kern-Fuller were aware of ULG's appearance in promotional materials for the income stream investments. The ongoing mention of ULG in these materials over time demonstrates that the ULG Respondents did not object to lending the name of ULG to promote the investment to potential investors. The record established that

[1141] *Id.* at 21, 945 P.2d at 332.
[1142] *Id.* at 22, 945 P.2d at 333.
[1143] Exh. S-195a at ACC000277.
[1144] Division's ULG Reply Br. at 26.
[1145] Exh. S-195a at ACC000273-ACC000274.
[1146] Exhs. S-195a at ACC000289, S-133, S-21 at ACC000413, S-90 at ACC002847.
[1147] Division's ULG Reply Br. at 27.

the description of ULG's role in marketing materials gave confidence to investors as well as to Mr. Smith and Mr. DeSimone, who then offered the investment to their clients. Accordingly, we find that the ULG Respondents induced the unlawful sale of securities under A.R.S. § 44-2003(A).

We further find that the ULG Respondents' role in selling the income stream investments was more than collateral. The ULG Respondents were responsible for varied roles over all stages of the process: providing securities advice to Mr. Gamber, reviewing and changing templates for the closing book documents, screening veterans as potential sellers, approving the completeness of documents for every investment, receiving and distributing investment proceeds, receiving and distributing seller payments, and attempting to enforce the investment contract against defaulting sellers. As such, the ULG Respondents very much "took part … with others" in the income stream investments. The ULG Respondents further "had a share or part" in the income stream investments as they were paid straight from the investment proceeds on a sliding scale based on the size of the investment, and then continued to receive funds for ULG's escrow service over the life of the investment. As such, we find that the ULG Respondents participated in the unlawful sale of securities under A.R.S. § 44-2003(A).

E. Registration Violations

Under A.R.S. § 44-1841, it is unlawful to sell or offer for sale within or from Arizona any securities unless those securities have been registered or are exempt from registration. PAC, FPD, SoBell, and BAIC securities have not been registered with the Commission.[1148] Under A.R.S. § 44-1842, it is unlawful for any dealer[1149] or salesman[1150] to sell or offer to sell any securities within or from Arizona unless the dealer or salesman is registered. None of the Respondents were registered with the Commission as securities dealers or salesmen.[1151]

The Division contends that Ms. Kern-Fuller and ULG each made, participated in or induced 53 sales of BAIC and SoBell securities. The Division argues that the BAIC and SoBell securities were

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[1148] Exhs. S-1, S-3, S-53b, S-53c.

[1149] The definition of a "dealer" under the Securities Act includes "a person who directly or indirectly engages full-time or part-time in this state as agent, broker or principal in the business of offering, buying, selling or otherwise dealing or trading in securities issued by another person, and who is not a salesman for a registered dealer or is not a bank or savings institution the business of which is supervised and regulated by an agency of this state or the United States." A.R.S. § 44-1801(10)(a).

[1150] The definition of a "salesman" under the Securities Act "means an individual, other than a dealer, employed, appointed or authorized by a dealer to sell securities in this state." A.R.S. § 44-1801(23).

[1151] Exhs. S-1, S-2, S-3, S-4, S-5, S-6, S-7.

unregistered and not exempt from registration. The Division concludes that Ms. Kern-Fuller and ULG each committed 53 violations of A.R.S. § 44-1841 from the sales of BAIC and SoBell investments.

The Division contends that PAC, Ms. Plant, FPD, Mr. Woodard, Mr. Corbett, Ms. Kern-Fuller, and ULG each made, participated in or induced six sales of PAC and FPD securities. The Division argues that PAC and FPD securities were unregistered and not exempt from registration. The Division concludes that PAC, Ms. Plant, FPD, Mr. Woodard, Mr. Corbett, Ms. Kern-Fuller, and ULG each committed six violations of A.R.S. § 44-1841 from the sales of PAC and FPD investments.

The Division contends that Smith & Cox, though registered as an investment advisor, offered and sold BAIC and SoBell securities as an unregistered dealer in violation of A.R.S. § 44-1842.[1152] The Division contends that Mr. Smith, though registered as an investment advisor representative, offered and sold BAIC and SoBell securities as an unregistered salesman in violation of A.R.S. § 44-1842.[1153] The Division argues that Ms. Kern-Fuller and ULG made, participated in or induced 53 unlawful sales of BAIC and SoBell securities by Mr. Smith and Smith & Cox. The Division concludes that Ms. Kern-Fuller and ULG each committed 53 violations of A.R.S. § 44-1842 from the sales of BAIC and SoBell investments.

The Division contends that Mr. DeSimone sold PAC and FPD securities, though neither Mr. DeSimone nor his company were registered as a securities dealer or salesman.[1154] The Division argues that PAC, Ms. Plant, FPD, Mr. Woodard, Mr. Corbett, Ms. Kern-Fuller, and ULG each made, participated in or induced six sales of PAC and FPD securities. The Division concludes that PAC, Ms. Plant, FPD, Mr. Woodard, Mr. Corbett, Ms. Kern-Fuller, and ULG each committed six violations of A.R.S. § 44-1842 from the sales of PAC and FPD investments.

The ULG Respondents repeat their contention that they have not "made, participated in or induced" the violations alleged by the Division, and, therefore, they have not violated A.R.S. §§ 44-1841 and 44-1842. The ULG Respondents repeat their contention that the income stream investments are not securities and, therefore, the ULG Respondents have not violated A.R.S. §§ 44-1841 and 44-1842. The ULG Respondents repeat their contention that the income stream investments are exempt

[1152] *See* Exh. S-58.
[1153] *See* Exh. S-59.
[1154] *See* Exh. S-41 at 9-10.

from registration requirements and, therefore, the ULG Respondents have not violated A.R.S. §§ 44-1841 and 44-1842. The ULG Respondents contend that they are not dealers or salesmen as defined in the Securities Act, and, therefore, they have not violated A.R.S. § 44-1842. In its Reply Brief, the Division asserts that it does not allege that that the ULG Respondents personally violated A.R.S. § 44-1842, but that the ULG Respondents participated in and induced the violations of A.R.S. § 44-1842 by other persons who were dealers and salesmen.

Contrary to the arguments of the ULG Respondents, we have determined, *supra*, that the income stream investments are securities which are not exempt from registration requirements. We have also determined, *supra*, that the ULG Respondents participated in and induced sales of the income stream investments. As such, the ULG Respondents can be found liable for the violations of A.R.S. § 44-1842 even though the ULG Respondents were neither dealers nor salesmen.

The evidence of record established that Ms. Kern-Fuller and ULG committed 59 violations of A.R.S. §§ 44-1841 and 44-1842 from the sales of the income stream investments. PAC, Ms. Plant, FPD, Mr. Woodard, and Mr. Corbett each committed six violations of A.R.S. §§ 44-1841 and 44-1842 from the sales of the income stream investments.

F. Fraud Violations

The Division contends that from October 28, 2013 through November 17, 2015, Ms. Kern-Fuller and ULG made, participated in or induced 53 fraudulent sales of BAIC and SoBell securities in violation of A.R.S. § 44-1991. The Division contends that from March 17 through May 23, 2017, PAC, Ms. Plant, FPD, Mr. Woodard, Mr. Corbett, Ms. Kern-Fuller, and ULG made, participated in or induced six fraudulent sales of PAC and FPD securities, in violation of A.R.S. § 44-1991.

The ULG Respondents note that neither the Division alleges nor the evidence supports an allegation that ULG had pre-investment interactions with any buyer or buyer's professional advisor-representative that would violate A.R.S. § 44-1991. The ULG Respondents note that the Division alleges that ULG "made, participated in or induced" fraudulent sales pursuant to A.R.S. § 44-2003(A), thereby violating A.R.S. § 44-1991(A). The ULG Respondents contend that they did not violate A.R.S. § 44-1991(A) as they have not "made, participated in or induced" an unlawful sale of securities. This argument fails as we have determined, *supra*, that the ULG Respondents, in fact, participated in and

induced sales of the income stream investments.

A.R.S. § 44-1991 provides, in pertinent part:

> It is a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this state involving an offer to sell or buy securities, or a sale or purchase of securities, including securities exempted under section 44-1843 or 44-1843.01 and including transactions exempted under section 44-1844, 44-1845 or 44-1850, directly or indirectly to do any of the following:
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> 1. Employ any device, scheme or artifice to defraud.
> 2. Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.
> 3. Engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit.

An issuer of securities has an affirmative duty not to mislead potential investors.[1155] Under A.R.S. § 44-1991(A)(2), a material fact is one that "would have assumed actual significance in the deliberations of the reasonable buyer."[1156] The test does not require an omission or misstatement to actually have been significant to a particular buyer.[1157] Materiality will also be found when there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available."[1158]

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[1155] *Trimble v. Am. Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (App. 1986).
[1156] *Aaron v. Fromkin*, 196 Ariz. 224, 227 ¶ 14, 994 P.2d 1039, 1042 (App. 2000).
[1157] *Hirsch*, 237 Ariz. at 464 ¶ 27, 352 P.3d at 933.
[1158] *Caruthers v. Underhill*, 230 Ariz. 513, 524 ¶ 43, 287 P.3d 807, 818 (App. 2012) (internal quotations omitted).

1. Federal Anti-Assignment Acts

The Division cites 38 U.S.C. § 5301(a)[1159] as prohibiting any purported sale or assignment of military benefits for consideration. The Division further cites 37 U.S.C. § 701(c) which provides that "[a]n enlisted member of the Army, Navy, Air Force, or Marine Corps may not assign his pay, and if he does so, the assignment is void." The Division notes that, pursuant to 37 U.S.C. § 101(21),[1160] the term "pay" includes retirement pay.

The Division asserts that the Respondents made the following fraudulent misrepresentations and omissions regarding the Federal Anti-Assignment Acts:

1) Failed to disclose to investors that the Federal Anti-Assignment Acts, 38 U.S.C. § 5301(a) and 37 U.S.C. § 701(c), prohibit the sale or assignment of veterans' pension and disability payments;

2) Misrepresented in the Contract for Sale of Payments that the transaction was "valid"

[1159] 38 U.S.C. § 5301(a) provides:

(1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

(2) For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving a benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(3) (A) This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, except as provided in subparagraph (B), and including deposit into a joint account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.

(B) Notwithstanding subparagraph (A), nothing in this paragraph is intended to prohibit a loan involving a beneficiary under the terms of which the beneficiary may use the benefit to repay such other person as long as each of the periodic payments made to repay such other person is separately and voluntarily executed by the beneficiary or is made by preauthorized electronic funds transfer pursuant to the Electronic Funds Transfers Act (15 U.S.C. 1693 et seq.).

(C) Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception.

[1160] 37 U.S.C. § 101(21) provides:

The term "pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

and not an "impermissible assignment" while failing to disclose the impact of the Federal Anti-Assignment Acts;

3) Misled investors that regulations restrict the assignment of pension and disability payments when the Federal Anti-Assignment Acts do not just "restrict" but prohibit their assignment;

4) Represented that "certain courts have held transactions of this nature to be enforceable" but a future court might not, while failing to disclose that several courts applying the Federal Anti-Assignment Acts have held transactions of this nature to be unenforceable;

5) Misled investors about the risk that a veteran might re-direct the pension or disability benefits back to himself by failing to disclose that the Federal Anti-Assignment Acts prohibit the sale or assignment of the pension and disability payments in the first place; and

6) Misled investors about the potential for an investor to obtain and collect a judgment against a veteran who re-directed his benefits payments to himself by failing to disclose that such payments are exempt from the claims of creditors.

a) ULG Respondents' Argument

The ULG Respondents contend that the income stream investments do not violate the Federal Anti-Assignment Acts. The ULG Respondents contend that the Contract for Sale of Payments is not an assignment or right to receive the benefit, but rather it is an agreement for the sale of monies that have already been distributed to and received into the control of the seller.[1161] The ULG Respondents contend that while the Federal Anti-Assignment Acts have changed over the years, they have continuously been found only to apply to money from the federal payment source that is "due or to become due," and do not apply to benefits after they are in control of the veteran or have been converted into permanent investments, like the benefits here.[1162] The ULG Respondents further contend that the

[1161] *See, e.g.*, Exhs. S-116 at ACC001495, ACC001483, ACC001503 ACC001506; S-21 at ACC000417, ACC000379, ACC000425, ACC000427.

[1162] Citing *McIntosh v. Aubrey*, 185 U.S. 122, 124, 22 S. Ct. 561, 562, 46 L. Ed. 834 (1902); *Trotter v. Tennessee*, 290 U.S. 354, 356-357, 54 S. Ct. 138, 139, 78 L. Ed. 358 (1933); *Lawrence v. Shaw*, 300 U.S. 245, 249-250, 57 S. Ct. 443, 445, 81 L. Ed. 623 (1937); *Carrier v. Bryant*, 306 U.S. 545, 547, 59 S. Ct. 707, 708, 83 L. Ed. 976 (1939); *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162, 82 S. Ct. 1231, 1233, 8 L. Ed. 2d 407 (1962); *United States v. Griffith*, 584 F.3d 1004, 1020 (10th Cir. 2009); *Goodemote v. Goodemote*, 2012 PA Super 94, 44 A.3d 74, 78 (2012); *In re Marriage of Green*, 169 P.3d

Contract for Sale of Payments is not an assignment under Arizona law.[1163]

The ULG Respondents note that *In re Pierson*[1164] applied state law to determine whether a transaction was an "assignment" and held that an income stream purchase arrangement is not an assignment under California law and, therefore, does not violate the Federal Anti-Assignment Acts. The ULG Respondents also rely on *Bostrom v. Bostrom*, which applied state law in holding that an agreement for valid consideration whereby a veteran agreed to hold a portion of VA benefits he received in trust for another was not an assignment and did not violate the Federal Anti-Assignment Acts.[1165]

> The United States does not recognize an assignment and will not be bound by it. However, after the beneficiary has received the money, so that he may do with it as he sees fit, his contract, relative thereto, may be enforced. The United States does not regard the beneficiary as a ward, nor attempt to control the disposition or expenditure of the proceeds. The proceeds cannot be assigned so as to compel the United States to pay to the assignee, nor give the assignee any claim whatever against the United States so as to hamper the latter or in any way compel it or even permit it to recognize the assignee. But the beneficiary may make his own contracts as to what he will do with the money after he gets it.[1166]

The ULG Respondents argue that the Contract for Sale of Payments operates in a like fashion: the United States is not compelled to pay the buyer, the buyer has no claim against the United States, and the United States is not hampered or compelled to recognize the buyer's rights.

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202, 204-205 (Colo. App. 2007); *Bischoff v. Bischoff*, 987 S.W.2d 798, 799-800 (Ky. App. 1998); *Gray v. Gray*, 1996 OK 84, 922 P.2d 615, 619-620 (1996); *Pfeil v. Pfeil*, 115 Wis. 2d 502, 341 N.W.2d 699, 702-703 (App. 1983); *Sec. Nat. Bank of Reno v. McColl*, 79 Nev. 423, 385 P.2d 825, 826-827 (1963); *Lucas v. Bd. of Equalization of Douglas Cty.*, 165 Neb. 315, 85 N.W.2d 638, 642-643 (1957).

[1163] Citing *Shreck v. Coates*, 59 Ariz. 269, 275, 126 P.2d 308, 311 (1942); *Martinez v. Bucyrus-Erie Co.*, 113 Ariz. 119, 120, 547 P.2d 473, 474 (1976); *State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 107 Ariz. 498, 503, 489 P.2d 837, 842 (1971); *Sherman v. First Am. Title Ins. Co.*, 201 Ariz. 564, 570, ¶17, 38 P.3d 1229, 1235 (App. 2002); *Armbruster v. WageWorks, Inc.*, 953 F. Supp. 2d 1072, 1075-1076 (D. Ariz. 2013); Restatement (Second) of Contracts § 330(1) (1981).

[1164] 447 B.R. 840, 847-849 (Bankr. N.D. Ohio 2011).

[1165] 60 N.D. 792, 236 N.W. 732, 734 (1931).

[1166] *Bostrom*, 60 N.D. 792, 236 N.W. at 735.

The *Pierson* court held that:

> [W]ith Mr. Pierson able to control, at all times, the disposition of his military pension, allowing Mr. Pierson to enter into a contractual relationship involving the use of his pension funds, once the funds had been distributed, does not frustrate the purpose of [the Federal Anti-Assignment Acts]. To hold otherwise, would extend the reach of [the Federal Anti-Assignment Acts] so as to protect the recipients of military pensions from the choices they make after the funds have been distributed to and then spent by the pensioner.... Obviously, far from helping military pensioners, such a reading of [the Federal Anti-Assignment Acts] would frustrate the ability of military pensioners from engaging in commerce as parties providing goods and/or services would be justifiably hesitant to enter into a contractual relationship with any person receiving a military pension.[1167]

The ULG Respondents argue that the Contract for Sale of Payments does not affect the payment of benefits due or to become due, and therefore does not violate Federal Anti-Assignment Acts because: (1) monies become subject to the terms of the Contract for Sale of Payments only after having been distributed to and in control of the seller and held in an escrow account under special agreement by which the deposits assume the character of investments that are no longer readily available as needed for support and maintenance;[1168] (2) the Payment Source and underlying asset remain at all times the sole property, and under the sole control, of the seller;[1169] and (3) pursuant to the Security Agreement, the monies do not become collateral until after they have been disbursed to, received by, and in control of the seller.[1170] The ULG Respondents argue that, therefore: (1) there is no conveyance of all the rights of the buyer to the seller; (2) the seller does not take the place of the buyer; and (3) the seller

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[1167] *Pierson*, 447 B.R. at 848.

[1168] *See, e.g.*, Exhs. S-116 at ACC001495, ACC001483, ACC001503, ACC001506; S-21 at ACC000417, ACC000379, ACC000425, ACC000427.

[1169] *See, e.g.*, Exhs. S-116 at ACC001495-ACC001496, ACC001506-ACC001508; S-21 at ACC000417-ACC000418, ACC000427-ACC000429.

[1170] *See, e.g.*, Exhs. S-116 at ACC001500-ACC001503; S-21 at ACC000422-ACC000425.

continues to exercise full control over the payment of benefits due or to become due, as evidenced by some sellers changing their minds and instructing the Payment Source to deposit the monies in an account other than the Contract for Sale of Payments' escrow account. The ULG Respondents argue that the income stream investments involved no intent to assign and no assignment, rather, the Contract for Sale of Payments is a promise by the seller that, once he or she has control over the monies due, the seller will pay part of it to the buyer, who has no other right to the monies. Therefore, the ULG Respondents conclude that the income stream investments do not violate the Federal Anti-Assignment Acts and the Security Agreements do not violate 38 U.S.C. § 5301(a)(3)(C).

In its Reply to the ULG Respondents Post-Hearing Brief, the Division argues that whether the income stream investments actually violate the Federal Anti-Assignment Acts does not matter, rather it was the risk that a court would invalidate an income stream investment that was not adequately disclosed to investors. The Division notes that the risk disclosures state "[a]lthough certain courts have held transactions of this nature to be enforceable, even in the presence of an anti-assignment clause, there is no assurance that a future court would permit the enforcement of payment rights under this arrangement."[1171] The Division contends that this disclosure falsely implies that no court had yet found a transaction similar to the income stream investments to have violated the Federal Anti-Assignment Acts when, in fact, a similar transaction was held unenforceable in 2011.[1172] The Division contends, therefore, that the disclosure documents misleadingly omitted a substantial risk that a court would make an adverse finding on the assignment issue.

The Division further argues that the ULG Respondents' arguments are incorrect on facts and law. The Division contends that the agreements contain multiple clauses that purport to transfer the veterans' rights to their payments, strip them of control of the payments, and impose draconian penalties if they violate the agreement. The Division notes that Section 5 of all Contracts for Sale of Payments require the veteran to agree to sell 100% of "right, title, and interest in and to" their retirement or disability payments.[1173] Regarding the BAIC and SoBell Contracts for Sale of Payments, the Division contends that lack of control by the veterans is demonstrated by: pension or benefit payments

[1171] *See, e.g.*, Exhs. S-21 at ACC000422, S-80 at ACC004776.
[1172] Citing *In re Dunlap*, 458 B.R. 301, 327 (Bankr. E.D. Va. 2011).
[1173] *See, e.g.*, Exhs. S-21 at ACC000413, S-24 at ACC000413, S-90 at ACC002847, S-91 at ACC002769.

being deposited directly into an "escrow account" under the control of ULG with the veterans having no power over the account;[1174] and Section 4.1 requiring that the "Seller shall direct that the Payments will be received and serviced by the Escrow Company," permitting the veterans no choice about the escrow account or the escrow agent.[1175] Regarding the PAC and FPD Contracts for Sale of Payments, the Division contends that lack of control by the veterans is demonstrated by: the requirement that the veterans either direct payments to be deposited into an account under control of ULG or authorize an automatic draft payable to ULG from an account where the veterans' benefits are deposited;[1176] the buyer being granted a security interest in the pension and disability payments deposited in the ULG account as well as "any and all banking or financial accounts of which [the veteran] is an account holder or beneficiary;"[1177] and the veteran agreeing not to assign, sell, lease, transfer, or otherwise dispose of the payment, and further agreeing that any interruption or interference with the flow of pension payments to the investor will be a default.[1178]

The Division contends that, contrary to the argument of the ULG Respondents, any control retained by the veterans over the funds was illusory as the Contract for Sale of Payments imposed significant penalties on the veterans if they should breach the agreement by redirecting money from the ULG IOLTA account or cancelling ULG's automatic withdrawals, including clauses for: indemnification,[1179] liquidated damages,[1180] consent to specific performance in the event of breach,[1181] and agreement to make continued payments to ULG in a holding account in the event of a dispute.[1182] The Division further notes that the Security Agreements used in connection with all Contracts for Sale of Payments gave a security interest to the investors in the receivables from the veterans' pension or disability payments.[1183]

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[1174] *See, e.g.*, Exhs. S-90 at ACC002847, S-91 at ACC002769.
[1175] *See, e.g.*, Exhs. S-90 at ACC002846, S-91 at ACC002768.
[1176] *See, e.g.*, Exhs. S-21 at ACC000413 at §§ 4.1, 4.2; S-24 at ACC000963 at §§ 4.1, 4.2.
[1177] *See, e.g.*, Exh. S-21 at ACC000425.
[1178] *See, e.g.*, Exh. S-21 at ACC000422-ACC000423.
[1179] *See, e.g.*, Exhs. S-21 at ACC000414, S-90 at ACC002848.
[1180] *Id.*
[1181] *Id.*
[1182] *See, e.g.*, Exhs. S-21 at ACC000415, S-90 at ACC002849.
[1183] *See, e.g.*, Exhs. S-21 at ACC000422, S-91 at ACC002774.

The Division disputes the ULG Respondents' contention that the veterans are selling monies after the veterans received them as evidenced by their never actually receiving the funds and their lack of control over the funds, making the transactions an assignment violating the Federal Anti-Assignment Acts. The Division further contends that the ULG Respondents rely upon an inapplicable common law definition of assignment, ignoring that 38 U.S.C. § 5301(a)(3)(A) was amended in 2003 to include a statutory definition of "assignment" that overrides the common law concepts. The Division argues that under 38 U.S.C. § 5301(a)(3)(A) an assignment exists whenever a veteran enters into "an agreement with another person" for that person to acquire "for consideration the right to receive such benefit by payment" of the disability compensation or pension, making the income stream investments assignments.

The Division contends that the ULG Respondents rely upon two "fundamentally flawed" cases.[1184] The Division argues that the debtor in *Pierson* apparently did not cite 38 U.S.C. § 5301 or 37 U.S.C. § 701[1185] and the court failed to analyze the assignment issue under 38 U.S.C. § 5301(a)(3)(A), thereby wrongly deciding the issue. The Division argues that the *Bostrom* decision is inapplicable because it was decided under 38 U.S.C. § 454, the repealed predecessor of the current Federal Anti-Assignment Acts, which did not contain the expanded statutory definition of assignment under 38 U.S.C. § 5301(a)(3)(A). The Division contends that Bostrom's reliance upon common law interpretations of "assignment" are unnecessary in light of the statutory definition.[1186] The Division goes on to note that several cases, not addressed by the ULG Respondents, found that structured investments, comparable to the income stream investments here, violate the Federal Anti-Assignment Acts.[1187]

The Division argues that the repealed 38 U.S.C. § 54 exclusively exempted payments "due or to become due," whereas the anti-assignment law here, 38 U.S.C. § 5301 applies "either before or after receipt by the beneficiary." The Division further contends that the cases cited by the ULG Respondents

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[1184] Division Reply Br. to ULG Respondents at 53.

[1185] Citing *Pierson*, 447 B.R. at 846.

[1186] Citing *State v. Bon*, 236 Ariz. 249, 251 ¶ 6, 338 P.3d 989, 991 (App. 2014) (When a statute defines a term, there is no need to resort to other methods of statutory interpretation).

[1187] Citing *e.g., In re Webb*, 376 B.R. 765, 767 (Bankr. W.D. Okla. 2007); *Dunlap*, 458 B.R. at 327; *In re Moorhous*, 108 F.3d 51, 55-56 (4th Cir. 1997); *In re Price*, 313 B.R. 805, 809 (Bankr. E.D. Ark. 2004).

regarding veteran payments converted to permanent investments do not apply as the veterans here did not purchase investments for their benefit, but rather sold their income streams as an investment for the investor's benefit. The Division notes that the ULG Respondents fail to state how they factually believe the veterans' payments were converted to investments, a proposition that the Division claims is not supported by the record. The Division cites the United States Supreme Court's holding in *Porter v. Aetna Cas. & Sur. Co.*, which held that a veteran's benefits deposited into an account at a federal savings and loan association "remain inviolate" from a creditor's reach.[1188] The Division notes that the Court in *Porter* applied a "quality of moneys" test, finding that as long as benefit funds retained the qualities of moneys, and have not been converted into permanent investments, the funds maintain their status as exempt benefits.[1189] The Division states that here, the money flows directly from DFAS or VA into the ULG IOLTA account or, under the PAC and FPD agreements, money is withdrawn by ULG and placed into an escrow account. The Division argues that, under this structure, each deposit is readily traceable and retains "the quality of moneys" as opposed to being converted into an investment property.

b) Michelle Plant's Argument

Ms. Plant contends that the income stream investments are not assignments and, therefore, do not violate the Federal Anti-Assignment Acts. Ms. Plant notes that an assignment entails "transfer of control of the thing assigned from the assignor to the assignee."[1190] Ms. Plant argues that whether a contract is an assignment is a question of construction generally determined by the intent of the parties.[1191] Ms. Plant notes that after an assignment, the assignee has all the rights and privileges previously held by the assignor.[1192] Ms. Plant argues that here the sellers did not relinquish control over their benefits but rather retained and used that control when they directed the VA to stop depositing payments in ULG's escrow account or cancelled their ACH withdrawal from their personal accounts. Ms. Plant argues that if the sellers actually assigned their benefits, buyers could demand payment

[1188] *Porter*, 370 U.S. at 162, 82 S. Ct. at 1233, 8 L. Ed. 2d 407.
[1189] *Id.*
[1190] Citing *Moore v. Weinberg*, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (App. 2007), aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009)
[1191] Citing *St. Lawrence Cement, Inc. v. Spivey*, 815 F.2d 965, 967 (4th Cir. 1987).
[1192] Citing *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 640, 518 S.E.2d 44, 46 (App. 1999).

directly from the VA.

Ms. Plant notes that the sellers in the six investments for which she is a Respondent all had their contractual payment drafted from personal accounts via ACH after receipt of the payment from the obligor, indicating that the sellers retained control of their benefits. Ms. Plant contends that the Contract for Sale of Payments gave the sellers the option to have their payments directed to the escrow company or to execute documents arranging for an automatic draft from the seller's own account.[1193] Ms. Plant notes that the six sellers all elected the automatic draft and completed a payment and account verification form and a bank ACH authorization.[1194] Ms. Plant argues that, therefore, the sellers received monies from the obligors before the payments were sent to the escrow agent. Since the sellers had control to default on the Contract for Sale of Payments, Ms. Plant argues that the contracts were not assignments. Ms. Plant argues that the sellers retained "ultimate authority and control" over their benefits, like the pensioner in *Pierson* where control was found to defeat the argument of assignment.[1195]

Ms. Plant contends that the contracts clearly demonstrated the intent was not to transfer ownership but for the sellers to pay the buyers from the sellers' VA benefits. Ms. Plant contends that if there was an assignment, there would be no need for a liquidated damages clause in the Contract for Sale of Payments.[1196] Ms. Plant notes that the Sales Assistance Agreements completed by each seller, as well as the Contract for Sale of Payments, state that the intent is for the transaction to be a valid sale of payments, not an impermissible assignment.[1197]

Ms. Plant further argues that the freedom to sell payments does not frustrate the purpose of the Federal Anti-Assignment Acts. Ms. Plant contends that contrary to the "protectionist and paternalistic" arguments advanced by the Division, courts have generally recognized that anti-assignment restrictions apply only to dealings between the government and the recipient, with the recipient able to do whatever he chooses after receipt.[1198] Ms. Plant cites *Pierson* and *Weber* as finding the Federal Anti-Assignment

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[1193] *See, e.g.*, Exh. S-21 at ACC000413.
[1194] *See, e.g.*, Exh. S-21 at ACC000443-ACC000444.
[1195] *Pierson*, 447 B.R. at 848.
[1196] *See, e.g.*, Exh. S-21 at ACC000414.
[1197] *See, e.g.*, Exh. S-21 at ACC000380 at § 7, ACC000414-ACC000415 at § 9.
[1198] Citing *Bostrom*, 60 N.D. 792, 236 N.W. at 735; *In re Weber, Not Reported* B.R., 2009 WL 983311, at *3 (Bankr. D. Neb. 2009); *Hobbs v. McLean*, 117 U.S. 567, 576, 6 S. Ct. 870, 874, 29 L. Ed. 940 (1886); *Pierson*, 447 B.R. at 848.

Acts were not intended to remove military benefits from general contract law where a veteran has willingly entered into an agreement after receipt of distributed benefits.[1199]

Ms. Plant contends that the evidence shows she did not believe the income stream investments violated the Federal Anti-Assignment Acts and that she relied on her corporate counsel's opinion.[1200]

Ms. Plant contends that the Federal Anti-Assignment Acts were properly disclosed in the Sales Assistance Agreement,[1201] the Contract for Sale of Payments,[1202] the Purchase Assistance Agreement,[1203] and the Disclosure of Risks Statement.[1204]

Ms. Plant argues that the Division incorrectly claims that the Federal Anti-Assignment Acts prohibit assignment rather than restrict assignment. Ms. Plant notes that the SEC has referred to alleged assignments like the income stream investments as being possibly restricted or prohibited, rather than expressly prohibited.[1205] Ms. Plant further notes that 38 U.S.C. § 5301(a)(1) states that benefits "shall not be assignable except to the extent specifically authorized by law," expressly allowing that assignments are not uniformly prohibited. Ms. Plant argues that 38 U.S.C. § 5301(a)(3)(B) excludes the prohibition of loans as long as payments are made by preauthorized electronic funds transfer, which was done for the six cases asserted against Ms. Plant.[1206] Ms. Plant notes that the VA's General Counsel has clarified their interpretation of 38 U.S.C. § 5301(a) "as clearly precluding any assignment of VA benefits that would require the VA or the Department of the Treasury to make payment directly to an assignee."[1207] Ms. Plant argues that this interpretation means the income stream investment contracts here did not violate the Federal Anti-Assignment Acts because buyers could not demand payment directly from the VA.

Ms. Plant contends that, contrary to the Division's allegation, courts have awarded judgments or garnishments involving the income stream investments and similar transactions.[1208] Ms. Plant

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[1199] *In re Weber*, 2009 WL 983311, at *3; *Pierson*, 447 B.R. at 848
[1200] Exhs. S-171 at ACC002370-ACC002371; S-195 at ACC000358, ACC000408.
[1201] *See, e.g.*, Exh. S-21 at ACC000380.
[1202] *See, e.g.*, Exh. S-21 at ACC000414.
[1203] *See, e.g.*, Exh. S-21 at ACC000429.
[1204] *See, e.g.*, Exh. S-21 at ACC000432.
[1205] Exh. ULG-7 at 2.
[1206] *See, e.g.*, Exh. S-21 at ACC000379, ACC000412-ACC000414, ACC000427, ACC000443, ACC000444.
[1207] Vet. Aff. Op. Gen. Couns. Prec. 2-2002, *Subj: Nonassignability of Benefits—38 U.S.C. § 5301(a)* (March 5, 2002).
[1208] Citing *Pierson*, 447 B.R. 840; *In re Weber*, 2009 WL 983311; *In re Heald*, 2003 Bankruptcy Lexis 21 2044; *Bostrom* 60 N.D. 792, 236 N.W. 732; Filing of Michelle Plant, August 20, 2019 at 10:02 a.m. (judicially noticed Tr. at 887).

contends that buyers may get a judgment, but they are not permitted to garnish a "protected amount."[1209] Ms. Plant argues that a United States Department of Labor ("DOL") Memorandum found that transactions involving pension payments could be subject to garnishment without violating ERISA's anti-alienation provision, which Ms. Plant contends are at least as strict as those for VA benefits and military retirement.[1210]

The Division, in its Reply to Ms. Plant's Post-Hearing Brief, references its Reply to the ULG Respondents' Post-Hearing Brief, which addressed the issues of inapplicable common law definitions of assignment and the fiction of the veterans retaining control of their benefits. Regarding Ms. Plant's claim that the transactions would not be prohibited assignments under 38 U.S.C. § 5301(a)(3)(B) if they were loans, the Division contends this argument is irrelevant as Ms. Plant has given testimony that the transactions are not loans.[1211]

The Division refutes Ms. Plant's contention that the reason for the Federal Anti-Assignment Acts was to protect the government, citing Senator Nelson, sponsor of the 2003 amendment to 38 U.S.C. § 5301, who stated that the amendment was added to prevent "scams [that] offer to advance to a veteran a lump sum amount of money for access to the veterans' future disability compensation."[1212] The Division notes that, prior to the 2003 amendment, courts recognized that the Federal Anti-Assignment Acts are designed for the protection of veterans.[1213] Regarding the VA memorandum cited by Ms. Plant, the Division notes that the opinion clarified that the VA is prohibited from deducting dental insurance premiums from veterans' benefits payments,[1214] which the Division contends does not limit the definition of an "assignment," especially considering that the definition was expanded after the 2003 amendment.

The Division contends that the intent of the buyer and seller not to make an assignment, pursuant to the language in the Contract for Sale of Payment, does not matter as the contract is void *ab initio* under 37 U.S.C. § 701(c). "A void contract is one which never had any legal existence or effect,

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[1209] Citing 31 C.F.R. §§ 212.3, 212.6(a).
[1210] Exh. ULG-8.
[1211] Exh. S-195a at ACC000356-ACC000357, ACC000372.
[1212] 149 Cong. Rec. S13743-01, S13748, 2003 WL 22466410 at **19 (Oct. 31, 2003).
[1213] Citing *Nelson v. Heiss*, 271 F.3d 891, 894 (9th Cir. 2001); *Porter*, 370 U.S. at 162, 82 S. Ct. at 1233, 8 L. Ed. 2d 407; *Wallace v. Commissioner of Internal Revenue*, 128 T.C. 132, 138 (Tax Court 2007).
[1214] Vet. Aff. Op. Gen. Couns. Prec. 2-2002.

and such a contract cannot in any manner have life breathed into it."[1215] The Division further contends that the garnishment rules cited by Ms. Plant are likewise inapplicable because the income stream investments never created a valid claim against the veterans.

The Division contends that the cases which upheld income stream investments, cited by Ms. Plant and judicially noticed, all fail to address the applicable law, namely 38 U.S.C. § 5301(a)(3)(A), which specifically prohibits these agreements. The Division argues that whether some courts have upheld income stream investments without considering 38 U.S.C. § 5301(a)(3)(A) is irrelevant because the risk that a court would invalidate a given income stream investment was far greater than what was disclosed to the investors. The Division notes that the Risk Disclosure stated: "Although certain courts have held transactions of this nature to be enforceable, even in the presence of an anti-assignment clause, there is no assurance that a future court would permit the enforcement of payment rights under this arrangement."[1216] The Division contends that this disclosure is "a half-truth at best" as the referenced courts did not consider 38 U.S.C. § 5301(a)(3)(A) and other courts had already found these types of agreements to be unenforceable.[1217]

The Division contends that the purported DOL Memorandum cited by Ms. Plant is not credible as it identifies no author and the accompanying letter from a DOL investigator is dated seven months before the Memorandum.[1218] The Division notes that no hearing testimony explained the Memorandum. The Division postulates that the Memorandum appears to have been written by a law firm for a client under investigation by DOL as it mentions "DOL was unwilling to specifically explain why it had served the subpoena…."[1219] The Division argues that pensions under ERISA are not subject to 38 U.S.C. § 5301(a)(3)(A). The Division further notes that no evidence of record compares the income stream investments in the Memorandum with those here.

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[1215] *Chicago Title Ins. Co. v. Renaissance Homes, Ltd.*, 139 Ariz. 494, 498, 679 P.2d 517, 521 (App. 1983) (internal citation omitted).
[1216] *See, e.g.*, Exh. S-21 at ACC000432.
[1217] Citing *Moorhous*, 108 F.3d at 53, 55-56; *Dunlap*, 458 B.R. at 325; *Webb*, 376 B.R. at 767-768; *Price*, 313 B.R. at 809.
[1218] Exh. ULG-8.
[1219] *Id.* at Memorandum 4 of 6.

c) Analysis and Conclusion

The Division has alleged that the Contract for Sale of Payments constituted an impermissible assignment under the Federal Anti-Assignment Acts. However, the Respondents have cited numerous cases where similar transactions have been found enforceable. The Division argues that these cases have been improperly decided, or were decided without consideration of the current Federal Anti-Assignment Acts. The Division further urges us to consider other cases where similar transactions were held unenforceable. Administrative hearings in Arizona require proof by a preponderance of the evidence.[1220] Here the Respondents have set forth arguments that cast doubt on whether a reviewing court would find the income stream investments unenforceable under the Federal Anti-Assignment Acts. The Division has not met its burden of proof to show that the income stream investments violate the Federal Anti-Assignment Acts.

While we cannot find the income stream investments to have constituted unlawful assignments, the Division has established that the investments carry a great risk of being found as such by a reviewing court. This risk needed to be adequately disclosed to the investors. The Disclosure of Risks Statement given to investors failed to mention the Federal Anti-Assignment Acts and, if found applicable to the Contract for Sale of Payments, their potential effect upon the investment. The Disclosure of Risks Statement stated that "certain courts have held transactions of this nature to be enforceable" while warning "there is no assurance that a future court would permit the enforcement of payment rights under this arrangement."[1221] However, no disclosure was made that, in fact, courts had found similar transactions unenforceable. The Disclosure of Risks Statement stated that "Non-receipt of Payments could occur for a number of reasons ranging from administrative delays, to the death of a Seller/Payee/Annuitant, or an intentional payment diversion."[1222] However, no disclosure was made that the payments could stop if the Federal Anti-Assignment Acts rendered the transaction void.

We find this information regarding the risks of unenforceability of the income stream investments, due to application of the Federal Anti-Assignment Acts and caselaw, to be significant and would have been material to a reasonable investor. We further find that the omission of these material

[1220] *Culpepper v. State*, 187 Ariz. 431, 437, 930 P.2d 508, 514 (App. 1996).
[1221] *See, e.g.*, Exh. S-21 at ACC000432.
[1222] *Id.*

facts constituted a violation of A.R.S. § 44-1991(A).

2. Role of ULG

The Division contends that the Respondents deceived investors with the illusion of legality by representing ULG as "Buyer's Legal Representation" and using ULG's IOLTA account to deposit the investors' investment funds and to distribute the veterans' monthly payments.

The ULG Respondents contend that they had no dealings with the sellers, buyers, or the buyers' professional advisor-representatives prior to sellers or buyers entering into a transaction. The ULG Respondents contend that Ms. Kern-Fuller and ULG provided legal representation to the distribution companies before and until the closing of the transaction.[1223] The ULG Respondents note that the transaction documents state that ULG's representation of the distributors was limited, specifically not including tax or securities advice.[1224] The ULG Respondents note that the transaction documents do not represent ULG as the buyer's independent legal counsel, but rather advise the seller and buyer to obtain independent legal advice. The ULG Respondents contend that after closing, ULG provided representation to buyers to administer escrow services.[1225]

However, we find, *infra* at Section III(G)(2), that the work performed by the ULG Respondents was conducted in a reckless, unprofessional manner that violated the applicable ethical rules for attorneys in South Carolina. The ULG Respondents continued to be involved in unlawful sales of securities after multiple cease and desist orders from other states found similar investments had violated securities laws in those jurisdictions.[1226] As we have found, *supra* in Section III(D)(2)(b), the description of ULG's role in the marketing materials gave confidence to investors that induced the unlawful sales of these securities. The ULG Respondents' unethical conduct and ongoing involvement in unlawful sales of securities rendered illusory their advertised role as "Buyer's Legal Representation" and "independent counsel," and the marketing of ULG's role deceived the investors into a false sense of the investment's safety. Accordingly, we find the Respondents, through the marketing of ULG's role in the investments, violated A.R.S. § 44-1991(A)(1), which prohibits "any device, scheme or

[1223] Exh. ULG-75.
[1224] Exh. ULG-75.
[1225] Exh. ULG-76.
[1226] *See* Exhs. S-28 – S-37.

artifice to defraud" and A.R.S. § 44-1991(A)(3) which prohibits "any transaction, practice or course of business which operates or would operate as a fraud or deceit."

3. Prior Orders and Tax Lien

a) Argument

The Division contends that the Respondents failed to disclose to investors the numerous consent orders and cease and desist orders against Mr. Gamber and/or his previous company, VFG, for insurance and securities law violations. The Division further contends that the Respondents failed to disclose that regulators in several states found that income stream investments, similar to the ones in this matter, violated those states' securities statutes and represented impermissible assignments in violation of 38 U.S.C. § 5301(a) and 37 U.S.C. § 701. The Division contends that the prior orders were material facts that the Respondents were required to disclose. "It cannot be disputed that a reasonable investor would want to know whether the person they are sending money to in order to purchase a stock has been previously found to have violated the securities laws."[1227]

The Division contends that, with respect to the 53 BAIC and SoBell investments sold by Mr. Smith and Smith & Cox, neither ULG, nor Ms. Kern-Fuller, nor anyone else disclosed to investors the existence of a $125,079 IRS lien against Mr. Smith. The Division contends that Mr. Smith's tax lien was a material fact as it raised questions concerning his competence, skill and judgment in financial matters.[1228] The Division contends that it would not be a defense if Ms. Kern-Fuller and ULG did not know about the tax lien because A.R.S. § 44-1991(A)(2) is a strict liability statute.[1229]

The ULG Respondents argue that the evidence shows that the buyers and their professional advisor-representatives had not met, communicated with, or contacted ULG prior to entering the transactions.[1230] The ULG Respondents contend that there is no evidence that ULG knew of the representations made in the marketing materials. The ULG Respondents also contend that the evidence does not establish that ULG had scienter or knowledge of the other states' default and consent orders

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[1227] *S.E.C. v. Levine*, 671 F. Supp. 2d 14, 28 (D.D.C. 2009).

[1228] Citing, *e.g., S.E.C. v. Merch. Capital, LLC*, 483 F.3d 747, 770-771 (11th Cir. 2007) (materially misleading to omit mention of a principal's personal bankruptcy when offering documents touted his business experience).

[1229] "A seller of securities is strictly liable for the misrepresentations or omissions he makes." *Garvin v. Greenbank*, 856 F.2d 1392, 1398 (9th Cir. 1988).

[1230] *See* Tr. at 109, 134-135, 188, 250, 345-347, 353, 361, 386-387, 430-432, 470, 548.

against Mr. Gamber and others. The ULG Respondents argue that the buyers' professional advisor-representatives testified that they did not locate the other states orders and that the Division's investigator testified that he did not know how the Division discovered the orders. The ULG Respondents note that scienter is not required for the seller of a security to be found liable under A.R.S. § 44-1991(A)(2),[1231] however ULG was not the seller in these transactions. The ULG Respondents further argue that "[t]he securities laws require disclosure only of information that is not otherwise in the public domain."[1232]

The Division argues that misleading omissions are not corrected by public domain information. The Division notes that investors are not required to investigate or perform due diligence.[1233] Rather, the Securities Act "places a heavy burden upon the offeror not to mislead potential investors in any way."[1234] The Division contends that the ULG Respondents incorrectly argue that scienter is required for participant or inducement liability for a violation of A.R.S. § 44-1991(A)(2). The Division notes that scienter is not a requirement for a violation of A.R.S. § 44-1991(A)(2),[1235] and "[a] misrepresentation in the sale of securities, even an innocent one, can be a violation of the securities statute, A.R.S. § 44-1991."[1236] "The elements of securities fraud are articulated within the statute itself."[1237] The Division argues that since A.R.S. § 44-2003(A) does not articulate a scienter element, just like A.R.S. § 44-1991(A)(2) does not, scienter is therefore not an element of a violation.

Ms. Plant argues that the Division has presented no evidence that she had knowledge of the other states' default and consent orders against Mr. Gamber and others. Ms. Plant argues that the PAC Option was a different product than the contracts addressed by those orders and, therefore, PAC had no reason to disclose them.

The Division renews its scienter argument against Ms. Plant and notes that Ms. Plant did, in fact, have knowledge of at least some of the prior orders, as she admitted having been told about an

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[1231] Citing *Rose*, 128 Ariz. at 214; *Garvin*, 856 F.2d at 1398.

[1232] *In re Allstate Life Ins. Co. Litig.*, No. CV-09-08162-PCT-GMS, 2013 WL 5161688, at *26 (D. Ariz. Sept. 13, 2013), *citing In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 279 (3d Cir.2004); *Whirlpool Financial Corp. v. GN Holdings*, Inc., 67 F.3d 605, 609 (7th Cir.1995).

[1233] *Trimble v. Am. Sav. Life Ins. Co.*, 152 Ariz. at 553, 733 P.2d at 1136.

[1234] *Id.*

[1235] *Allstate Life Ins. Co. v. Robert W. Baird & Co.*, 756 F. Supp. 2d 1113, 1160 (D. Ariz. 2010).

[1236] *Rosier v. First Fin. Capital Corp.*, 181 Ariz. 218, 222, 889 P.2d 11, 15 (App. 1994).

[1237] *Aaron v. Fromkin*, 196 Ariz. 224, 227, ¶ 13, 994 P.2d 1039, 1042 (App. 2000).

Arkansas cease and desist order in April 2013,[1238] and was made aware of a Texas cease and desist order in February 2016.[1239]

The Division further contends that in five of six transactions[1240] PAC offered an income stream investment that was virtually identical to those offered by the companies subject to the previous orders.[1241] "The existence of a state cease and desist order against identical instruments is clearly relevant to a reasonable investor, who is naturally interested in whether management is following the law in marketing the securities."[1242] The Division notes that a PAC Option was sold in all six of the investments, so PAC, under Ms. Plant's supervision, reviewed the income stream investments and ensured the enforceability and accuracy of supporting documents without disclosing the prior cease and desist orders.[1243]

The Division argues that the duty to disclose borne by PAC and Ms. Plant arises not just because of the similarities of the investments, but also because Mr. Gamber, through his company AAG Holdings, was a partial owner of PAC.[1244] The Division contends that Ms. Plant herself had such involvement with the related businesses that the Texas Securities Division found Respondent SoBell to have violated Texas securities laws by failing to disclose that Ms. Plant, "the Vice President of PAC, was also the Director of Compliance for VFG, LLC."[1245] The Division notes that Mr. Zimmerman and Ms. Schlack would not have invested in the income stream investments had they known of Ms. Plant's involvement in companies subject to the prior orders.[1246]

b) Analysis and Conclusion

We find that the orders against Mr. Gamber and/or VFG and the tax lien against Mr. Smith constitute information that would be considered material to a reasonable investor. The ULG Respondents argue that public domain information need not be disclosed to investors. However, the ULG Respondents have not cited controlling authority under the Securities Act supporting this

[1238] Exh. S-195a at ACC000249.
[1239] Answer of Michelle Plant at ¶ 19.
[1240] Exhs. S-21, S-22, S-23, S-25, and S-26.
[1241] *See, e.g.*, Exhs S-21 at ACC000412-ACC000416, S-91 at ACC002763-ACC002767, S-38 at ACC002045-ACC2049.
[1242] *S.E.C. v. Merch. Capital, LLC*, 483 F.3d 747, 771 (11th Cir. 2007).
[1243] Exhs. S-20 at ACC000331, S-171 at ACC002376.
[1244] Exh. S-195a at ACC000311.
[1245] Exh. S-36 at ACC006236.
[1246] Tr. at 418, 460.

argument. Adopting this approach to public domain information would be at odds with *Trimble*, which held:

> The statutes do not require investors to act with due diligence.... To the contrary, [offerors] have an affirmative duty not to mislead potential investors.... This requirement not only removes the burden of investigation from an investor, but places a heavy burden upon the offeror not to mislead potential investors in any way.[1247]

Both the ULG Respondents and Ms. Plant argue that they cannot have violated A.R.S. § 44-1991(A)(2) because they were not "sellers" of the income stream investments and there has been no showing of scienter. While the ULG Respondents, PAC, and Ms. Plant may not be "sellers" of the income stream investments, they participated in and induced those sales. Ms. Plant's argument that she lacked knowledge of the prior orders is not supported by the evidence of record, and, regardless, the Securities Act does not require proof of scienter under A.R.S. § 44-1991(A)(2) or A.R.S. § 44-2003(A). As there is no controlling legal authority to find a public domain exception or a scienter requirement to a violation of A.R.S. § 44-1991(A)(2), we reject these arguments of the ULG Respondents. We find that the failure to disclose the orders against Mr. Gamber and his companies and the tax lien against Mr. Smith are omissions of material facts that constitute violations of A.R.S. § 44-1991(A).

G. Safe Harbor Defense of A.R.S. § 44-2003(A)

The Division notes that A.R.S. § 44-2003(A) provides a safe harbor from securities liability: "No person shall be deemed to have participated in any sale or purchase solely by reason of having acted in the ordinary course of that person's professional capacity in connection with that sale or purchase." The Division contends that this safe harbor does not apply to Ms. Kern-Fuller or ULG. "Professionals who knowingly or recklessly violate the standards of their profession when advising their clients are not providing legitimate professional advice for which statutory protection should exist."[1248] The Division contends that the testimony and expert report of Professor John Freeman detail

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[1247] *Trimble v. Am. Sav. Life Ins. Co.*, 152 Ariz. at 553, 733 P.2d at 1136.

[1248] Richard G. Himelrick, *Arizona Securities Law: Civil Liability, Defenses and Remedies* at § 5.1.5, p. 271 (5th ed. 2018).

that Ms. Kern-Fuller acted outside the ordinary course of her profession.

1. Expert Report and Testimony of John Freeman

The ULG Respondents renew their hearing objection to the testimony of Professor Freeman. The ULG Respondents contend that "Freeman's testimony is irrelevant, immaterial, unreliable, untrustworthy, not probative and not helpful; and therefore should not be considered or given any weight under A.R.S. § 41-1062(A)(1)."[1249] The ULG Respondents further contend that Professor Freeman's testimony does not meet the relevant and reliable test for the admissibility of expert testimony.[1250] The ULG Respondents contend that Professor Freeman's testimony "is based on assumptions and conjecture that are sheer speculation and not supported by competent evidence in the record."[1251] "[E]xpert opinion evidence based on sheer speculation is not competent."[1252]

The ULG Respondents argue that Professor Freeman's testimony should not be considered or given any weight as it is based on testimony from withdrawn exhibits S-194, S-198, S-199, and S-200 (collectively, "Withdrawn Exhibits").[1253] The Withdrawn Exhibits, containing CFPB Civil Investigative Demand and Hearing Testimony transcripts of Michael Chrustawka, Katherine Snyder, and Andrew Gamber, were submitted as exhibits by the Division and objected to by the ULG Respondents. At hearing, the ALJ ruled that if the Division intended to admit the Withdrawn Exhibits, a continuance would be allowed for the Respondents to obtain testimony from the declarants, to which the Division withdrew its motion to admit them.[1254] The ULG Respondents contend that Professor Freeman's testimony is the result of his speculations and assumptions based on his review of the Withdrawn Exhibits.

The ULG Respondents contend that the Withdrawn Exhibits are hearsay evidence that is not reliable, probative, relevant, or material because it was self-serving to the declarants and not subject to cross-examination of the ULG Respondents, and therefore not admissible under A.R.S. § 41-1062(A)(1). Therefore, Professor Freeman's testimony should also be considered not reliable,

[1249] ULG Respondents Post-Hearing Br. at 48.
[1250] *State ex rel. Montgomery v. Miller*, 234 Ariz. 289, 298, ¶ 19, 321 P.3d 454, 463 (App. 2014).
[1251] ULG Respondents Post-Hearing Br. at 49.
[1252] *Sobieski v. Am. Standard Ins. Co. of Wisconsin*, 240 Ariz. 531, 542, ¶ 45, 382 P.3d 89, 100 (App. 2016).
[1253] The Division also includes Exh. S-197, a motion to quash a CFPB investigative demand that was drafted by an employee of ULG. Division Reply to ULG Post-Hearing Br. at 31, n. 12.
[1254] Tr. at 896-898.

probative, relevant, or material, and therefore, should not be given weight or considered pursuant to A.R.S. § 41-1062(A)(1).

The ULG Respondents further argue that, contrary to the Division's statements at hearing, Rule 703 of the Arizona Rules of Evidence[1255] does not permit an expert to rely on facts not in evidence that are not trustworthy, such as the testimony in the Withdrawn Exhibits that was not subject to cross-examination.[1256]

The ULG Respondents contend that Professor Freeman's testimony is also based on unreliable and untrustworthy hearsay obtained from articles, the internet and other sources.[1257] The ULG Respondents contend that Professor Freeman's testimony relies on non-litigated orders from other states that: 1) do not address controlling law holding that the transactions do not violate the Federal Anti-Assignment Acts, and 2) do not deal with the nuances of Arizona law and the Securities Act.

The ULG Respondents contend that Professor Freeman's testimony also should not be considered or given any weight under A.R.S. § 41-1062(A)(1) because it couches the ultimate issue of whether ULG "made, participated in or induced" the sale of the income stream investments under A.R.S. § 2003(A) as legal conclusions and opines on questions of law that are for the court, not expert opinion.[1258]

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[1255] Ariz. R. Evid. 703 provides:
An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

[1256] Citing, e.g., *Pipher v. Loo*, 221 Ariz. 399, 402, ¶ 8, 212 P.3d 91, 94 (App. 2009) ("test for admissibility of an expert's opinion based on facts not in evidence is whether the source relied upon by the expert is reliable").

[1257] *See, e.g.*, Tr. at 802-809, 846-848, 854; Exh. S-46 at 5-6.

[1258] *See, e.g., Boisson v. Arizona Bd. of Regents*, 236 Ariz. 619, 625, ¶ 19, 343 P.3d 931, 937 (App. 2015) (issue of law is for the court to decide, not experts); *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 355, ¶ 20, 166 P.3d 140, 146 (App. 2007) (expert opinion "constituted inadmissible legal conclusions under Rule 704 because he thereby told the jury how to decide the case"); *Badia v. City of Casa Grande*, 195 Ariz. 349, 354, ¶ 17, 988 P.2d 134, 139 (App. 1999). *See also, Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (Expert testimony on issues of law is inadmissible and "Professor Freeman's affidavit reads as if it could have been respondents' oral argument to the trial court.... Although Professor Freeman arguably offered some helpful, factual information, the overwhelming majority of the affidavit is simply legal argument...").

The Division notes that the ULG Respondents stipulated to the admission of the Freeman Report at the hearing[1259] and they are now precluded from attacking its admissibility.[1260] The Division argues that Professor Freeman assumed the same facts in his testimony at hearing as he did in the Freeman Report,[1261] to which the ULG Respondents did not object to the assumptions relied upon therein.

The Division argues that it is appropriate for an expert to base an opinion on assumptions, which can be attacked by an opposing party by asking if changes to those assumptions would change the opinion, which the ULG Respondents did on cross-examination.[1262] The Division notes that Professor Freeman relied upon assumptions that the income stream investments involved unlawful securities sales and were fraudulent, which were necessary assumptions for his opinion about participant liability and the professional capacity defense to be relevant.[1263] The Division argues that the rest of Professor Freeman's "assumptions" were actually facts he observed or inferences he drew from the information he received before rendering his opinion.

The Division contends that Professor Freeman's reliance on the Withdrawn Exhibits is not a basis to exclude his testimony. "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed."[1264] Further, the Division notes that the ALJ at the hearing rejected the ULG Respondents' arguments that the Withdrawn Exhibits are irrelevant, immaterial, unreliable and untrustworthy, and that the ALJ would have conditioned their admissibility on a continuance only due to the late disclosure of the Withdrawn Exhibits.[1265] The Division notes that A.R.S. § 41-1062(A)(1) allows for the rules of evidence to be relaxed so long as the evidence supporting the decision or order is substantial, reliable, and probative, but since Professor Freeman's testimony is admissible under a strict application of Rule 703, A.R.S. § 41-1062(A)(1) does not even

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[1259] Tr. at 78-80.

[1260] The Division argues that by stipulating to the admissibility of the Expert Report, the ULG Respondents have stipulated that it was admissible under Rule 702 of the Arizona Rules of Evidence which requires that: a) it contained specialized knowledge that will help the trier of fact to understand the evidence or to determine a fact in issue, b) it is based on sufficient facts or data, c) it is the product of reliable principles and methods, and d) it has reliably applied the principles and methods to the facts of the case. *See* Ariz. R. Evid. 702.

[1261] Tr. at 863.

[1262] *Cunningham v. Gans*, 507 F.2d 496, 501 (2d Cir. 1974).

[1263] Tr. at 809-810, 866.

[1264] Ariz. R. Evid. 703.

[1265] Tr. at 896-897.

need to be considered.

The Division further argues that Professor Freeman's testimony is not probative of legal issues, but of fact issues: 1) what constitutes the ordinary course of an attorney's professional capacity, and 2) whether the ULG Respondents acted in the ordinary course of their professional capacity. The Division contends these questions of fact must be determined for the Commission to consider the applicability of the professional capacity defense asserted by the ULG Respondents.

The Division notes that Professor Freeman also testified that the ULG Respondents participated in the income stream investment sales. The Division argues that the standard for participant liability under A.R.S. § 44-2033 is an issue of law, but whether the ULG Respondents' conduct met that standard is an application of the facts. Further, the Division notes that "[a]n opinion is not objectionable just because it embraces an ultimate issue."[1266]

The ULG Respondents contend that Professor Freeman's opinion is based on "sheer speculation." We disagree. The assumptions made by Professor Freeman were that the income stream investments were sold fraudulently and in violation of securities laws. These assumptions are not speculation as we have reached these same conclusions based on the evidence of record.

The ULG Respondents stipulated to the admission of the Freeman Report. We find that Professor Freeman gave opinion evidence regarding facts at issue in this case and that his testimony complies with Arizona Rules of Evidence 702, 703, and 704. As Professor Freeman's testimony is admissible under the rules of evidence, we need not apply A.R.S. § 41-1062(A)(1). We deny the ULG Respondents' motion to strike Professor Freeman's testimony and we reject the argument that his testimony should be given no weight.

2. Application of A.R.S. § 44-2003(A)

The ULG Respondents argue that ULG's actions come within the protections of A.R.S. § 44-2003(A). The ULG Respondents contend that ULG served as an attorney for the distributors, before and up to the closing of a transaction, providing limited legal services specifically excluding tax or securities advice.[1267] After the transaction closed, that legal engagement ended and ULG began its

[1266] Ariz. R. Evid. 704(a).
[1267] *See, e.g.*, Exh. ULG-75 at 1, 2.

engagement as the escrow company pursuant to the transaction documents.[1268] As such, the ULG Respondents contend that the Division's allegations against ULG fail under A.R.S. § 44-2003(A).[1269]

The ULG Respondents contend that the Division's arguments are based solely upon the testimony of Professor Freeman that ULG "participated in illegal activity," and "operated or managed a criminal enterprise," and thereby did not act in the ordinary course of their professional capacity.

The Division contends that A.R.S. § 44-2003(A) does not apply to ULG and Ms. Kern-Fuller. The Division notes that the plain language of the statute expressly limits the defense to participant liability, meaning that acting in the ordinary course of one's professional capacity is not a defense to inducement liability. "Had the legislature also intended to exempt such persons from inducement liability, it surely would have said so."[1270]

The Division further contends that a lawyer acting outside the relevant ethical rules is not acting in the course of their professional capacity.[1271] The Division notes that the ULG Respondents have not argued against using ethical rules to measure compliance with the professional capacity defense. The Division contends that Professor Freeman detailed the standards of conduct applicable to Ms. Kern-Fuller as an attorney in South Carolina as well as the ways she fell below that standard,[1272] including his opinion that: 1) ULG and Ms. Kern-Fuller violated an ethical rule that prohibits assisting a client in illegal or fraudulent conduct;[1273] 2) ULG and Ms. Kern-Fuller violated ethical rules requiring the duty of diligence, the duty to give information to clients, and the duty to avoid conflicts of interest because ULG and Ms. Kern-Fuller failed to prepare appropriate risk disclosures to the investors and failed to disclose they represented the interests of the distributors and had a vested interest in the sale

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[1268] *See, e.g.*, Exhs. ULG-75, ULG-76, S-21 at ACC000436-ACC000439, S-26 at ACC00116-ACC001164.

[1269] Citing, e.g., Tr. at 905-923, 1017-1022, 1119-1126; Exh. ULG-84.

[1270] *Grand*, 225 Ariz. at 176, ¶ 23, 236 P.3d at 403.

[1271] Citing *Facciola v. Greenberg Traurig LLP*, 2011 WL 2268950, at *4 (D. Ariz. 2011):

> Allegations that Greenberg knowingly assisted in ML's fraud are obviously acts beyond the ordinary course of Greenberg's professional duties. A lawyer may not continue to provide services to a client when the lawyer knows that the client is engaged in a course of conduct designed to deceive others, and where it is obvious that the lawyer's compliant legal services may be a substantial factor in permitting the deceit to continue. Rules of Prof. Conduct, ER 1.16.

See also, Himelrick, *Arizona Securities Law: Civil Liability, Defenses and Remedies* at § 5.1.1.5. ("Professionals who knowingly or recklessly violate the standards of their profession when advising their clients are not providing legitimate professional advice for which statutory protection should exist").

[1272] Exh. S-46 at 6-8, 21-28.

[1273] Tr. at 828-829.

of the income stream investments;[1274] and 3) Ms. Kern-Fuller lacked the knowledge to competently advise Mr. Gamber that the income stream investments were not securities, as reflected in ULG's engagement agreement which stated "no member of [ULG] or its staff is competent to provide securities advice.[1275] The Division contends that Ms. Kern-Fuller's deficient conduct as a South Carolina attorney means that she and her law firm were not acting in the ordinary course of their professional capacities.

We have held, *supra*, that the ULG Respondents induced as well as participated in the unlawful sale of securities under A.R.S. § 44-2003(A). As the professional capacity defense is expressly limited to participation, the ULG Respondents' actions have placed them outside the scope of the defense. Even if the ULG Respondents had only participated in the unlawful sale, we find the testimony of Professor Freeman established that the ULG Respondents acted in a "reckless, unprofessional manner" that violated the applicable ethical rules for attorneys in South Carolina.[1276] The ULG Respondents have failed to meet their burden of proof to establish the applicability of the professional capacity defense.

H. Control Person Liability

The Division contends that Ms. Kern-Fuller, Ms. Plant, and Mr. Woodard are liable as control persons for violations of the antifraud provisions of the Securities Act. The Division argues that Ms. Kern-Fuller was a partner in ULG and is presumptively liable for ULG's violations of A.R.S. § 44-1991. The Division argues that Ms. Plant is (or was) the Vice President and the COO of PAC, making her presumptively liable for PAC's violations of A.R.S. 44-1991. The Division contends that Mr. Woodard is the Managing Partner of FPD and is presumptively liable for FPD's violations of A.R.S. § 44-1991.

Under A.R.S. § 44-1999(B), "Every person who, directly or indirectly, controls any person liable for a violation of section 44-1991 or 44-1992 is liable jointly and severally with and to the same extent as the controlled person to any person to whom the controlled person is liable unless the

[1274] Tr. at 832-840. Professor Freeman especially pointed out the concession by ULG and Ms. Kern-Fuller's counsel in a South Carolina hearing that the investors in these transactions had no enforceable rights. Tr. at 840-841; Exh. S-173 at 9.
[1275] Tr. at 823, 845-846; Exh. ULG-75 at ¶ 6.
[1276] Exh. S-46 at 27.

controlling person acted in good faith and did not directly or indirectly induce the act underlying the action." For the purposes of A.R.S. § 44-1999(B), a person may include an individual, corporation or limited liability company.[1277] In *E. Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, the Arizona Court of Appeals interpreted A.R.S. § 44-1999(B) "as imposing presumptive control liability on persons who have the *power* to directly or indirectly control the activities of those persons or entities liable as primary violators of [A.R.S.] §§ 44–1991 and –1992."[1278] Therefore, to establish control "the evidence need only show that the person targeted as a controlling person had the legal power, either individually or as part of a control group, to control the activities of the primary violator."[1279]

Mr. Woodard is the Managing Partner of FPD. No evidence has been submitted opposing the presumptive control person liability of Mr. Woodard. Accordingly, we find Mr. Woodard is liable as a control person for the antifraud violations of FPD, pursuant to A.R.S. § 44-1999(B).

1. Candy Kern-Fuller

The ULG Respondents contend that no control person liability can attach to Ms. Kern-Fuller because ULG has not violated A.R.S. § 44-1991. The ULG Respondents further contend that Ms. Kern-Fuller acted in good faith and did not directly or indirectly induce the unlawful sale of securities.

The Division contends that Ms. Kern-Fuller was liable for inducing unlawful sales of the income stream investments. The Division contends that Ms. Kern-Fuller failed to meet the burden of proof to establish the good faith defense to control person liability. The Division contends that ULG approved all the sales at issue in spite of numerous cease and desist orders[1280] against Mr. Gamber and his companies, and failed to exercise proper due diligence.[1281] The Division further argues that Ms. Kern-Fuller, acting for ULG, directed and drafted changes to the Disclosure of Risks Statement,[1282] which contained misstatements and omissions amounting to securities fraud.

Ms. Kern-Fuller does not dispute that, as a partner of ULG, she was in a position of control of ULG. We have found, *supra*, that Ms. Kern-Fuller and ULG both induced unlawful sales of the income

[1277] A.R.S. § 44-1801(16).
[1278] *E. Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 412, 79 P.3d 86, 99 (App. 2003) (Emphasis in original).
[1279] *Id.*
[1280] *See* Exhs. S-28 – S-37.
[1281] Exh. S-46 at 24.
[1282] Exh. S-195a at ACC000289-ACC000291.

stream investments. As such, a good faith defense is unavailable to Ms. Kern-Fuller. We find Ms. Kern-Fuller is liable as a control person for the antifraud violations of ULG, pursuant to A.R.S. § 44-1999(B).

2. Michelle Plant

a) Argument

Ms. Plant contends that the Division failed to prove beyond a reasonable doubt her status as a control person of PAC. Ms. Plant contends that her signature on documents[1283] was dictated by the course of her employment with PAC as an obligation dictated by the actual control person, Katherine Snyder. Ms. Plant argues that her signature shows that she was merely performing clerical and administrative duties as assigned to her. Ms. Plant contends that she took direction from PAC and their corporate counsel.[1284]

Ms. Plant notes that seven of the Division's witnesses, five investors and two financial advisors, all testified that they had not relied on advice from Ms. Plant, and they had never met or spoken with her prior to the hearing.[1285] In support of her contention that she was not a control person for PAC, Ms. Plant cites the testimony of Mr. Smith, who ceased selling the product in 2015, and: considered Ms. Plant a "back office" employee;[1286] attended meetings to resolve issues with PAC where Ms. Plant was not present;[1287] and made arrangements with other persons regarding PAC contracts.[1288]

Ms. Plant argues her testimony in her Examination Under Oath before the CFPB is reliable as she was not subject to an action against her at the time. Ms. Plant cites her testimony that she was not involved in the process of removing Mr. Gamber from PAC, establishing a new company, or finding and employing new attorneys for the company.[1289] Ms. Plant cites her testimony as indicating she did not have authority to access company financial information[1290] or to approve an option for a seller.[1291]

[1283] Tr. at 417; Exh. S-21.
[1284] Exh. S-171 at ACC002370.
[1285] *See* Tr. at 144, 200, 259, 260, 360-361, 440, 481, 567.
[1286] Tr. at 362.
[1287] Tr. at 366-367.
[1288] Tr. at 370-371.
[1289] Exh. S-195 at ACC000310-ACC000314, ACC000346-ACC000347, ACC000387, ACC000406, ACC000408.
[1290] Exh. S-195 at ACC000404.
[1291] Exh. S-195 at ACC000333.

Ms. Plant contends others were control persons at PAC and LFO.[1292]

Ms. Plant contends that she cannot be considered a control person simply because she was assigned the title COO, which she only had for six of the cases the Division has alleged.

Ms. Plant contends that her correspondence with the Arkansas Insurance Department, Exhibit S-171, was written without the knowledge that it would be shared with the Division to be used against her, but it should be considered reliable and consistent with her CFPB testimony. In her correspondence, Ms. Plant described her job duties as Vice President:

i. Handling the majority of the contact between PAC and third-parties (such as BAIC, SoBell, Corbett, and distributors);

ii. Formatting documents created by Jennifer and John Vermillion, Esqs., who were co-owners at the inception of PAC. As documents continued to evolve, I would implement the changes to the documents and send them to legal to PAC's attorneys to review and/or correct as necessary;

iii. Creating and managing data filing system;

iv. Researching and consulting with PAC's legal counsel on any issues pertaining to seller reviews for option approval;

v. Working with Michael Chrustawka to review potential options;

vi. Sending requests to seller's agents (BAIC/SoBell) for further information (NOTE: During that period PAC had no direct communication with Sellers).[1293]

Ms. Plant also wrote that in May 2016 she requested and received the title of COO with no additional authority or increase to salary. Ms. Plant described her duties at this time:

i. Hiring, training, and managing case managers (who collected and verified information from Sellers in order for PAC to make an option determination and then issue its final determination prior to the Buyer and Seller closing the transaction). Many times, a Seller's case was

[1292] Exhs. S-195 at ACC000301-ACC000302, ACC000305, ACC000370-ACC000371, ACC000331, ACC000379; S-171 at ACC002375, ACC002368.
[1293] Exh. S-171 at ACC002375.

initially approved for an option, but the option rescinded prior to closing due to information learned during PAC's internal "drill down" processes;

ii. As discussed with the CFPB, one of PAC's goals was to ensure that the paperwork was accurate so that if one of the contracts defaulted and needed to be purchased from the Buyer, that it was enforceable;

iii. Tracking the sellers progress and providing PAC with the information needed for them to make a determination about their individual case;

iv. As part of my duties, I was involved in the day-to-day work with defaulted cases, when Buyers requested to exercise their option(s).[1294]

Ms. Plant further notes that she was not included in an email from Ms. Kern-Fuller requesting clarity on how PAC was doing business,[1295] and that she was mostly not copied on a string of emails from another source requesting accounting information for PAC, which was answered by Katherine Snyder.[1296] From the accounting emails, Ms. Plant points out that she is not included in a list of reimbursements related to the PAC company startup (a list that includes Tammy Doll, Andrew Gamber, ICSI, and Katherine Snyder)[1297] or among those receiving distributions (Andrew Gamber, Brad Chrustawka, and PAC's then corporate counsel, John and Jennifer Vermillion).[1298]

Ms. Plant cites a chain of text messages between Andrew Gamber and Brad Chrustawka where Ms. Plant is presented as: following orders rather than making decisions;[1299] doing administrative assistant duties;[1300] and not being among the owners and principals of PAC.[1301] Ms. Plant cites a complaint filed in South Carolina federal court by the Bureau of Consumer Financial Protection and South Carolina Department of Consumer Affairs naming Katherine Snyder, PAC, and LFO as defendants and stating Ms. Snyder "had managerial responsibility for PAC and materially participated

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[1294] Exh. S-171 at ACC002376.
[1295] Exh. ULG-10.
[1296] Exh. ULG-11.
[1297] Exh. ULG-11 at 7 of 14.
[1298] Exh ULG-11 at 11, 14 of 14.
[1299] Exh. ULG-12 at 8 of 19 ("Woodard is now calling Plant demanding answers. I told her to explain she has passed along his requests and she is waiting for the reply").
[1300] Exh. ULG-12 at 10 of 19 ("Drew, Michelle is sending me the spreadsheet with the OPSD fees off the cases Woodard changed at closing").
[1301] Exh, ULG-12 at 2 of 19 ("Drew, I am not an owner of PAC…. Kate owns KBF…. KBF and AAG are the owners of PAC. I think that is Kate, Ashley and yourself.").

in the conduct of PAC's affairs."[1302] Ms. Plant notes that she is not mentioned on a Delaware State website entity listing for PAC.[1303] Ms. Plant references a virtual office agreement for PAC, dated before she began her employment with PAC, identifying Michael Chrustawka as the contact person for PAC and Katherine Snyder as the credit cardholder for payment.[1304]

Ms. Plant argues that the Division failed to set forth evidence establishing her as a control person because such evidence does not exist.

The Division contends that a preponderance of the evidence at hearing shows that Ms. Plant possessed the power to directly or indirectly control the activities of PAC between March 2017 and June 2017. The Division notes that during this timeframe, Ms. Plant was the Vice President and COO of PAC. In addition to her duties as stated by Ms. Plant, the Division notes that Ms. Plant, as Vice President and COO of PAC, signed all six of the PAC Option agreements.[1305] The Division notes that there is no evidence in the record that anyone other than Ms. Plant had authority to sign a PAC Option agreement.

The Division contends that Ms. Plant's position as Vice President and COO of PAC is significant as "titles can be sufficient to allege control person liability under the Arizona statute since control liability may be premised on the power to control and does not require actual participation in the wrongful conduct."[1306] The Division contends that Ms. Plant has cited no evidence to show that her power to directly or indirectly control PAC fell below that typically conferred on a corporate COO.

The Division replies to Ms. Plant's assertion that she did not directly interact with investors and was considered a "back of house" person by Mr. Smith by noting that control liability does not require reliance. The Division contends that requiring evidence that a control person actually participated in the fraudulent activity would "frustrate the intent behind the creation of controlling person liability."[1307] The Division argues that there is no witness testimony that suggests Ms. Plant lacked the power to

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[1302] Plant Post-Hearing Br. at Exh. A ¶ 8. Ms. Plant acknowledges the complaint was filed on October 1, 2019, after the close of the hearing record in this case.
[1303] Exh. S-8.
[1304] Exh. S-9.
[1305] Exhs. S-21 at ACC000456, S-22 at ACC000557, S-23 at ACC000858, S-24 at ACC001009, S-25 at ACC001101, S-26 at ACC001181.
[1306] *Facciola v. Greenberg Traurig, LLP*, 781 F. Supp. 2d 913, 923 (D. Ariz. 2011), aff'd, 593 F. App'x 723 (9th Cir. 2015) (internal citation omitted).
[1307] *E. Vanguard Forex, Ltd.*, 206 Ariz. at 412, ¶ 41, 79 P.3d at 99.

control PAC as implied by her titles as Vice President and COO, confirmed by her explanation of her job duties and illustrated by her signature on the PAC Options. The Division further argues that there is no evidence that any other officer (CEO, CFO, etc.) even existed.

The Division contends that Ms. Plant did not need to have been an owner of PAC to have control power.[1308] Further, the Division contends that Ms. Plant's assertions that others had control over PAC are not a defense to her being a control person because a controlling person may have power as part of a group, as reflected by A.R.S. § 44-1999(B) which holds liable "every person" who directly or indirectly controls the violator. The Division contends that during the relevant time period, Ms. Plant possessed the power to influence the behavior of PAC. The Division argues that at an absolute minimum Ms. Plant could have influenced PAC's behavior with respect to the six investments by not signing them for PAC.

b) Analysis and Conclusion

As we have noted, administrative hearings in Arizona require proof by a preponderance of the evidence.[1309] Ms. Plant had the titles of Vice President and COO of PAC. In that capacity, she signed the PAC Options for all six of the pension steam investments at issue. Ms. Plant's contention that this was an administrative task is not supported by the evidence. The record does not show anyone else at PAC had signature authority to enter these agreements. Ms. Plant hired, trained and managed PAC's case managers who collected and verified the information used to make the determination to approve a PAC Option. Ms. Plant argues that she did not have an ownership interest in PAC and others had duties that should be considered those of a control person. However, control need not be vested in a single person to establish liability under A.R.S. § 44-1999(B). The weight of the evidence established that Ms. Plant was a control person for PAC. Accordingly, we find that Ms. Plant is liable as a control person for the antifraud violations of PAC, pursuant to A.R.S. § 44-1999(B).

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[1308] *See id.* ("The SEC has long defined "control" as meaning "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise" (internal citation omitted)).

[1309] *Culpepper*, 187 Ariz. at 437, 930 P.2d at 514.

I. Marital Community Liability

The Division contends that the marital community of the Woodards should be liable for any order of the Commission. The Division notes that the Amended Notice alleged that Ms. Woodard was at all relevant times the spouse of Mr. Woodard, and that he acted on behalf of the marital community.[1310] The Division notes that the Woodards were personally served with the Amended Notice on July 10, 2019, in Texas.[1311] The Division contends that Texas is a community property jurisdiction.[1312] The Division further notes that at no time did the Woodards file an answer, appear, or otherwise defend this action.

Under A.A.C. R14-4-305, "[a]n allegation not denied shall be considered admitted." The Woodards have not responded to the Division's allegations. Accordingly, we find that an order for restitution and/or administrative penalties arising from the Securities Act violations of Mr. Woodard would be a community obligation.

J. Remedies

The Division argues that the Commission has broad authority to order respondents to remedy violations of the Securities Act. The Division contends that the Respondents should pay restitution and administrative penalties for their violations of the Securities Act. The Division also seeks the entry of a cease and desist order against the Respondents for future violations.

The ULG Respondents argue that the bases for their argument that they did not make, participate in or induce unlawful sales of securities should be considered mitigating circumstances in the calculation of restitution and administrative penalties. The ULG Respondents further contend that ULG is a two-lawyer firm of which Ms. Kern-Fuller is one of the lawyers. The ULG Respondents argue that counting violations against both Ms. Kern-Fuller and ULG would essentially double any restitution and administrative penalties against Ms. Kern-Fuller, and would be excessive under A.R.S. § 44-2036(A) and A.A.C. R14-4-308(C).

The Division notes that the Commission's rules provide for restitution in the amount of consideration paid for unlawful securities minus any repayments plus interest from the dates of

[1310] Amended Notice at ¶¶ 7 and 9.
[1311] *See* Affidavit of Service, filed July 16, 2019.
[1312] Citing, *e.g.*, Texas Family Code Ann. § 3.003 – Presumption of Community Property.

purchase.[1313] The Division further notes that the Commission may reduce a restitution amount but any reduction must be "necessary or appropriate for the public interest and consistent with the protection of the investors...."[1314] The Division contends that the ULG Respondents were responsible for directing changes to the risk disclosure statements at the heart of the fraud in this case, that the ULG Respondents are not deserving of mitigation, and that the investors would not be protected by a reduction of the restitution. The Division contends that each "person" who violated the Securities Act is subject to liability and that Ms. Kern-Fuller's doing business in a corporate form grants both advantages and disadvantages which she has accepted.

1. Restitution

The Division contends that the Commission should order ULG and Ms. Kern-Fuller to pay restitution in the amount of $2,572,247.37 for the 53 BAIC and SoBell investments. The Division contends that the Commission should order all Respondents to pay restitution of $371,191.23 for the six PAC and FPD investments.

The ULG Respondents contend that any restitution order must allow for offsets of payments, which the ALJ left open. The ULG Respondents contend that they "would be allowed to present documents and information supporting all payments made to Buyers and other corrections to the Division's prayer for restitution, thereby reducing the amount in the Division's prayer for restitution."[1315]

The Division notes that, with consent of the ULG Respondents, the hearing record was closed with the ULG Respondents allowed to provide repayment documentation to the Division to offset a restitution order.

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[1313] A.A.C. R14-4-308(C)(1).
[1314] A.A.C. R14-4-308(C)(5).
[1315] ULG Post-Hearing Br. at 62.

The Commission has the authority to order restitution pursuant to A.R.S. § 44-2032.[1316] From October 28, 2013 through November 17, 2015, the ULG Respondents made, participated in or induced 53 sales of BAIC and SoBell investments to 21 investors totaling $2,776,952.62.[1317] One of these investors was Mr. Hebb, who invested $125,000.01 and has been repaid approximately $22,856.01.[1318] Another of these investors, John McLeod, paid $200,000.02[1319] and was repaid $181,849.24.[1320] The evidence of record does not establish any other payments to investors and the record is closed. Accounting for the offsets of payments to Mr. Hebb and Mr. McLeod, ULG and Ms. Kern-Fuller are liable for restitution in the amount of $2,572,247.37.

From March 17, 2017 through May 23, 2017, the Respondents made, participated in or induced six sales of PAC and FPD investments to four investors totaling $371,191.23.[1321] The evidence of record does not establish any payments have been made to investors and the record is closed. Accordingly, the Respondents are liable for restitution in the amount of $371,191.23. We find that ordering lesser amounts of restitution would neither be necessary or appropriate to the public interest nor be consistent with the protection of the investors.

2. Administrative Penalties

The Division recommends an order of administrative penalties against the Respondents in the following amounts: $450,000 against ULG, $450,000 against Ms. Kern-Fuller, and $90,000 each against Ms. Plant, PAC, FPD, Mr. Woodard, and Mr. Corbett. The Division recommends that one-third of each administrative penalty be imposed for violations of A.R.S. § 44-1991(A), for which control person liability would extend to Ms. Kern-Fuller for ULG, Ms. Plant for PAC, and Mr.

[1316] A.R.S. § 44-2032 provides, in pertinent part:

> If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is engaging in or is about to engage in any act, practice or transaction that constitutes a violation of this chapter, or any rule or order of the commission under this chapter, the commission, in its discretion may:
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> 1. Issue an order directing such person to cease and desist from engaging in the act, practice or transaction, or doing any other act in furtherance of the act, practice or transaction, and to take appropriate affirmative action within a reasonable period of time, as prescribed by the commission, to correct the conditions resulting from the act, practice or transaction including, without limitation, a requirement to provide restitution as prescribed by rules of the commission. …

[1317] Exh. S-79.

[1318] Tr. at 186.

[1319] Exh. S-79.

[1320] *BAIC, Inc., et. al.*, Docket No. S-21044A-18-0071, Tr. at 459, 460.

[1321] Exh. S-42, Tr. at 658-659.

Woodard for FPD, pursuant to A.R.S. § 44-1999(B). The Division contends that its recommendation as to the ULG Respondents is lenient as the Division has requested the Commission assess one violation of A.R.S. § 44-1991(A) for each transaction although the ULG Respondents have committed hundreds of individual violations of A.R.S. § 44-1991(A).

Under A.R.S. § 44-2036(A), the Commission has authority to assess an administrative penalty of no more than $5,000 for each violation committed.[1322] We do not find the ULG Respondents' asserted defenses to be mitigating factors. Nor do we find the corporate structure of ULG a basis for affording relief to ULG or Ms. Kern-Fuller. We do find mitigating that some fraud allegations relied upon by the Division have not been proven, namely that the income stream investments violated the Federal Anti-Assignment Acts. We consider as an aggravating factor that the Respondents continued to be involved in unlawful sales of securities after multiple cease and desist orders from other states found similar investments violated securities laws in those jurisdictions.

The record established that ULG and Ms. Kern-Fuller made, participated in or induced 59 unlawful sales, each in violation of A.R.S. §§ 44-1841, 44-1842, and 44-1991. We find appropriate to order an administrative penalty of $240,000 each for ULG and Ms. Kern-Fuller, of which $80,000 each is apportioned to antifraud violations. The record established that Ms. Plant, PAC, FPD, Mr. Woodard, and Mr. Corbett made, participated in or induced six unlawful sales, each in violation of A.R.S. §§ 44-1841, 44-1842, and 44-1991. We find appropriate to order an administrative penalty of $21,000 each for Ms. Plant, PAC, FPD, Mr. Woodard, and Mr. Corbett, of which $7,000 each is apportioned to antifraud violations.

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Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

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[1322] A.R.S. § 44-2036 provides, in pertinent part:
A. A person who, in an administrative action, is found to have violated any provision of this chapter or any rule or order of the commission may be assessed an administrative penalty by the commission, after a hearing, in an amount of not to exceed five thousand dollars for each violation.

FINDINGS OF FACT

1. Respondent Performance Arbitrage Company, Inc., is a Delaware corporation that was incorporated on February 3, 2014.[1323] PAC's principal place of business is a Regus Business Center office located at 232 Market Street, Flowood, Mississippi 39232.[1324] PAC has not been registered by the Commission as a securities salesman or dealer.[1325]

2. Respondent Michelle Plant was a Vice President and the Chief Operating Officer of PAC.[1326] Ms. Plant has not been registered by the Commission as a securities salesman or dealer.[1327]

3. Respondent Financial Product Distributors, LLC, is a Delaware limited liability company with its principal place of business in Austin, Texas.[1328] FPD has not been registered by the Commission as a securities salesman or dealer.[1329]

4. Respondent Michael David Woodard is a resident of Texas.[1330] Mr. Woodard was registered as a securities salesman with the Commission from June 16, 2015 to July 27, 2015.[1331] On July 8, 2016, FINRA barred Mr. Woodard from association with any FINRA member in any capacity.[1332]

5. Mr. Woodard is the Managing Partner of FPD.[1333]

6. Deborah G. Woodard was at all relevant times the spouse of Mr. Woodard.[1334]

7. Respondent Mark Corbett is a resident of California.[1335] Mr. Corbett has not been registered by the Commission as a securities salesman or dealer.[1336]

8. Respondent Upstate Law Group, LLC, is a South Carolina limited liability company practicing law from its offices in Easley, South Carolina.[1337] ULG has not been registered by the

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[1323] Exh. S-8.
[1324] Exh. S-9.
[1325] Exh. S-1.
[1326] Exh. S-171 at ACC002375-ACC002376.
[1327] Exh. S-2.
[1328] Exh. S-10.
[1329] Exh. S-3.
[1330] Amended Notice at ¶ 5.
[1331] Exhs, S-13, S-14, S-15.
[1332] Exh. S-15.
[1333] Exh. S-12.
[1334] Amended Notice at ¶ 6.
[1335] Exh. S-172 at 11.
[1336] Exh. S-5.
[1337] Exhs. S-17, S-18.

Commission as a securities salesman or dealer.[1338]

9. Respondent Candy Kern-Fuller is a resident of South Carolina and an attorney.[1339] Ms. Kern-Fuller is a founder of and partner in ULG.[1340] Ms. Kern-Fuller has not been registered by the Commission as a securities salesman or dealer.[1341]

10. Ms. Kern-Fuller, ULG, and Mr. Corbett, among others, were Respondents in a related enforcement action, *BAIC, Inc., et. al.*, Docket No. S-21044A-18-0071. The 53 investments at issue in *BAIC* were sold between October 2013 and November 2015, and were issued by BAIC and SoBell.

11. BAIC is (or was) a Texas for-profit corporation with its principal place of business in Texas.[1342] BAIC has not been registered by the Commission as a securities salesman or dealer.[1343]

12. SoBell is (or was) a Mississippi for-profit corporation with its principal place of business in Mississippi.[1344] SoBell has not been registered by the Commission as a securities salesman or dealer.[1345]

13. Andrew Gamber is (or was) the President of BAIC[1346] and the incorporator of SoBell.[1347] Mr. Gamber has not been registered by the Commission as a securities salesman or dealer.[1348]

14. The investments at issue involved a program where Mr. Corbett solicited a U.S. military veteran (the seller) receiving an income stream, in the form of a retirement pension from the Defense Finance and Accounting Service ("DFAS") or disability benefits from the Department of Veteran Affairs ("VA"), to sell a number of future monthly payments from the pension or disability benefits to an investor (the buyer) in exchange for a discounted lump sum payment.[1349]

15. Between October 2013 and November 2015, the income stream investments were

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[1338] Exh. S-6.
[1339] Exh. S-18.
[1340] Exh. S-18.
[1341] Exh. S-7.
[1342] Exh. S-55 at ACC005832-ACC005839.
[1343] Exh. S-53c.
[1344] Exh. S-56 at ACC005840-ACC005841.
[1345] Exh. S-53b.
[1346] Exh. S-55 at ACC005835-ACC005836.
[1347] Exh. S-56 at ACC005840-ACC005841.
[1348] Exh. S-53a.
[1349] Tr. at 637; Exh. S-155.

offered through either BAIC[1350] or SoBell.[1351] Ms. Plant previously worked as the Director of Compliance at BAIC[1352] and as an independent contractor for SoBell.[1353]

16. Between April 2013 and November 2014, securities regulators in Arkansas, Iowa, New Mexico, Pennsylvania, Florida, and California issued cease and desist orders against Mr. Gamber and/or his prior company, VFG, for violations of those states' securities laws, including antifraud violations, arising from the sale of income stream investments involving veterans' pensions and disability benefits.[1354] Ms. Plant previously worked as the Director of Compliance for VFG.[1355]

17. Between March and May 2017, the investments were offered through FPD or PAC.[1356] Mr. Gamber was a part-owner of PAC through another of his companies, AAG Holdings, for an unknown period of time.[1357]

18. To sell the investments, BAIC, SoBell, FPD or PAC, through their sales agents, located an investor to purchase the veteran's pension or disability benefit payments for a specific term, such as five, eight, or ten years.[1358] The investment documents represented that the investor would receive a specified rate of return, ranging between 5% and 8.25%.[1359]

19. Marketing materials for the BAIC and SoBell investments sold between October 2013 and November 2015 and the FPD and PAC investments sold between March and May 2017, identified duties of ULG including reviewing documents and processing payments through ULG's trust accounts.[1360]

20. To complete a sale when an investor agreed to invest, BAIC, SoBell, FPD, and PAC used several form documents that were presented to the investor in a "closing book" or "fulfillment kit."[1361] The closing book and fulfillment kit form documents were substantially identical regardless

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[1350] Exhs. S-80 – S-118.
[1351] Exhs. S-119 – S-132.
[1352] Exh. S-171 at ACC002374.
[1353] Exh. S-171 at ACC002375.
[1354] Exhs. S-28 – S-35.
[1355] *See* Exh. S-171 at ACC002372-ACC002373.
[1356] *See* Exh. S-42.
[1357] Exh. S-171 at ACC002375.
[1358] *See* Exhs. S-42, S-79.
[1359] *See* Exhs. S-42, S-79.
[1360] Exhs. S-20 at ACC000327, ACC000330; S-74 at ACC000336; S-138 at ACC006521.
[1361] *See, e.g.*, Exhs. S-21, S-26, S-116, S-119.

of which entity offered the investment.[1362]

21. None of the documents in the closing books and fulfillment kits disclosed the Federal Anti-Assignment Acts, 38 U.S.C. § 5301(a) and 37 U.S.C. § 701(c).[1363]

22. Mr. Corbett identified veterans who were willing to sell a portion of their military pension payments or veteran's disability benefit payments to investors in exchange for a lump sum payment.[1364] Mr. Corbett was listed as the vendor in the Sales Assistance Agreement in the closing books or fulfillment kits for 48 of the 53 BAIC and SoBell investments at issue[1365] and all six of the PAC and FPD investments.[1366]

23. The Sales Assistance Agreements provided for the veteran to pay BAIC, SoBell or Corbett a commission at the closing of the sale.[1367] ULG received fees of at least $48,695.62.[1368]

24. Each closing book and fulfillment kit included a Purchase Assistance Agreement which the investor executed to engage BAIC, SoBell, FPD or PAC to assist in purchasing future payments from the veteran's pension or disability benefits.[1369]

25. The Purchase Assistance Agreements directed the investor to send his or her investment monies payable to ULG's IOLTA account.[1370]

26. Each closing book included a Contract for Sale of Payments executed in counterparts by the investor and veteran.[1371] For the BAIC and SoBell investments, the Contract for Sale of Payments required the veteran to change the account where he or she received monthly pension or disability payments to a designated escrow account at ULG.[1372] ULG then transferred the payments from this IOLTA account to the investors each month.[1373]

27. For the FPD and PAC investments, the Contract for Sale of Payments required the

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[1362] Tr. at 602, 605-606; S-54a at 102-103.
[1363] *See, e.g.*, Exhs. S-21, S-26, S-116, S-119.
[1364] Tr. at 637; Exh. S-155.
[1365] *See* Exh. S-79.
[1366] Exh. S-42.
[1367] *See* S-109 at ACC005191, S-116 at ACC001483, S-117 at ACC005275, S-119 at ACC000439, S-120 at ACC000491, S-21 at ACC000379-ACC000381, S-26 at ACC001105-ACC001107.
[1368] Exh. S-134 at 4 of 4.
[1369] *See, e.g.*, S-108 at ACC005107-ACC005111, S-119 at ACC000462-ACC000466.
[1370] *See, e.g.*, Exhs. S-108 at ACC005107-ACC005111, S-119 at ACC000462-ACC000466.
[1371] *See, e.g.*, Exh. S-116 at ACC001490-ACC001499.
[1372] *See, e.g.*, Exh. S-116 at ACC001490-ACC001491.
[1373] *See* Tr. at 327; Exh. S-74 at ACC000335.

veteran to provide ULG with an automatic draft monthly from the veteran's bank account where DFAS or VA deposited the veteran's monthly benefits.[1374] The FPD and PAC fulfillment kits included a Payment and Account Verification form executed by the veteran authorizing ULG to make ACH debits and withdrawals from the veteran's bank account for the monthly amounts specified in the Contract for Sale of Payments.[1375]

28. After ULG received a veteran's monthly pension or disability payment, ULG disbursed the payment to the investor who had purchased that veteran's monthly payment.[1376]

29. Each closing book also included a Disclosure of Risks Statement for the investor to sign.[1377] The Disclosure of Risks stated, in pertinent part:

> Restrictions On Assignability/Collectability. Pension income stream payments fall under regulatory restriction that restricts the assignment of the schedule payments due thereunder…. Consequently, this transaction is a purchase of a contractual right to a payment obligation and not the payment per se. Although certain courts have held transactions of this nature to be enforceable even in the presence of an anti-assignment clause, there is no assurance that a future court would permit the enforcement of payment rights under this arrangement.[1378]

30. The Disclosure of Risks also stated, in pertinent part:

> Non-receipt of Scheduled Payment/Collections. Non-receipt of payment could occur for a number of reasons ranging from administrative delays … [to] a payment diversion. A diversion occurs when a Seller redirects any scheduled payment previously sold to Buyer to any entity other than the Buyer in violation of the Seller's contractual agreements with the Buyer. The Transaction Assistance Team considers a diversion to be a default by the Seller…. Buyer's ability to enforce judgments, realize

[1374] *See, e.g.*, Exh. S-21 at ACC000413.
[1375] *See, e.g.*, Exh. S-21 at ACC000443-ACC000444.
[1376] *See, e.g.*, Exh. S-21 at ACC000413.
[1377] *See, e.g.*, Exh. S-108 at ACC005112.
[1378] *See, e.g.*, Exh. S-108 at ACC005112.

success in the garnishment process and prevail in the redirecting of the payments cannot be guaranteed.[1379]

31. In connection with the 53 BAIC and SoBell investments, between October 2013 and November 2015, neither the ULG Respondents nor anyone else disclosed to any investors any of the cease and desist orders against Mr. Gamber and/or VFG for securities violations issued from April 2013 through November 2014.[1380]

32. On February 1, 2016, the Texas State Securities Board issued an Emergency Cease and Desist Order against Mr. Gamber and SoBell for having engaged in fraud in the offer or sale of securities involving veterans' pensions and disability benefits.[1381]

33. On February 23, 2017, the Mississippi Secretary of State issued a Cease and Desist Order against SoBell, BAIC, VFG, and Mr. Gamber for securities registration and fraud violations involving veterans' pensions and disability benefits.[1382]

34. In connection with the six income stream investments between March and May 2017, the Respondents failed to disclose to investors any of the cease and desist orders against Mr. Gamber and his companies.[1383]

35. On June 25, 2013, the IRS recorded a Notice of Federal Tax Lien in Pima County against William Andrew Smith for $125,079 in unpaid income taxes.[1384] Mr. Smith was the Arizona salesman who sold the 53 investments between October 2013 and November 2015.[1385] Neither the ULG Respondents nor anyone else disclosed to investors the IRS tax lien against Mr. Smith.[1386]

36. From October 28, 2013 through November 17, 2015, 53 sales were made of BAIC and SoBell investments to 21 investors totaling $2,776,952.62.[1387] By these sales, ULG generated fees for itself of at least $48,695.62.[1388]

[1379] *See, e.g.*, Exh. S-108 at ACC005112.
[1380] *See* Exh. S-54a at 94-97; Tr. at 343-345, 389-390.
[1381] Exh. S-36.
[1382] Exh. S-37.
[1383] *See* Tr. at 412, 460, 579-580.
[1384] *See* Tr. at 298, 299; Exh. S-54a at 130.
[1385] *See* Tr. at 334.
[1386] *See* Tr. at 98, 110-111, 128, 162, 383.
[1387] Exh. S-79.
[1388] Exh. S-134.

37. From March 17, 2017 through May 23, 2017, the Respondents made, participated in or induced six sales of PAC and FPD investments to four investors totaling $371,191.23.[1389]

38. These findings of fact are based upon the Discussion above, and those findings are also incorporated herein.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter pursuant to Article XV of the Arizona Constitution and A.R.S. §§ 44-1801, *et. seq.*

2. The findings contained in the Discussion above are incorporated herein.

3. Within or from Arizona, Respondents PAC, Michelle Plant, FPD, Michael Woodard, Mark Corbett, ULG, and Candy Kern-Fuller made, participated in or induced the offer and sale of securities, within the meaning of A.R.S. §§ 44-1801 and 44-2003(A).

4. Respondents PAC, Michelle Plant, FPD, Michael Woodard, Mark Corbett, ULG, and Candy Kern-Fuller failed to meet their burden of proof pursuant to A.R.S. § 44-2033 to establish that the securities offered and sold herein were exempt from regulation under the Securities Act.

5. Respondents PAC, Michelle Plant, FPD, Michael Woodard, Mark Corbett, ULG, and Candy Kern-Fuller violated A.R.S. § 44-1841 by having made, participated in or induced the offer and sale of securities that were neither registered nor exempt from registration.

6. Respondents PAC, Michelle Plant, FPD, Michael Woodard, Mark Corbett, ULG, and Candy Kern-Fuller violated A.R.S. § 44-1842 by having made, participated in or induced the offer and sale of securities while not being registered as dealers or salesmen.

7. Respondents PAC, Michelle Plant, FPD, Michael Woodard, Mark Corbett, ULG, and Candy Kern-Fuller committed fraud by having made, participated in or induced the offer and sale of securities, in violation of A.R.S. § 44-1991, in the manner set forth hereinabove.

8. Respondent Michelle Plant directly or indirectly controlled PAC, within the meaning of A.R.S. § 44-1999, and she is jointly and severally liable with PAC, for violations of A.R.S. § 44-1991.

9. Respondent Michael Woodard directly or indirectly controlled FPD, within the meaning

[1389] Exh. S-42; Tr. at 658-659.

of A.R.S. § 44-1999, and he is jointly and severally liable with FPD, for violations of A.R.S. § 44-1991.

10. Respondent Candy Kern-Fuller directly or indirectly controlled ULG, within the meaning of A.R.S. § 44-1999, and she is jointly and severally liable with ULG, for violations of A.R.S. § 44-1991.

11. Respondents PAC's, Michelle Plant's, FPD's, Michael Woodard's, Mark Corbett's, ULG's, and Candy Kern-Fuller's conduct is grounds for a cease and desist order pursuant to A.R.S. § 44-2032.

12. Respondents PAC's, Michelle Plant's, FPD's, Michael Woodard's, Mark Corbett's, ULG's, and Candy Kern-Fuller's conduct is grounds for an order of restitution pursuant to A.R.S. § 44-2032 and A.A.C. R14-4-308, which shall be a community obligation for the marital community of Michael Woodard and Deborah Woodard.

13. Respondents PAC's, Michelle Plant's, FPD's, Michael Woodard's, Mark Corbett's, ULG's, and Candy Kern-Fuller's conduct is grounds to order administrative penalties pursuant to A.R.S. § 44-2036, which shall be a community obligation for the marital community of Michael Woodard and Deborah Woodard.

ORDER

IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2032, Respondents PAC, Michelle Plant, FPD, Michael Woodard, Mark Corbett, ULG, and Candy Kern-Fuller shall cease and desist from their actions, as described above, in violation of A.R.S. §§ 44-1841, 44-1842 and 44-1991.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. §§ 44-2032, 44-1999(B), and 44-2003(A), with respect to the 53 BAIC and SoBell investments, which are also at issue in *BAIC, Inc., et al.*, Docket No. S-21044A-18-0071, Respondents ULG and Candy Kern-Fuller shall make restitution in the principal amount of $2,572,247.37, jointly and severally with the Respondents in that action: Smith & Cox, LLC, William Andrew Smith and Kimberly Ann Smith, Christopher Spence Cox and Beth Cox, Mark Corbett, BAIC, Inc., SoBell Corp, and Andrew Gamber. Restitution shall be payable to the Arizona Corporation Commission within 90

days of the effective date of this Decision. Such restitution shall be made pursuant to A.A.C. R14-4-308 subject to legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. §§ 44-2032 and 44-2003(A), with respect to the six PAC and FPD investments, Respondents PAC, Michelle Plant, FPD, Michael Woodard, Mark Corbett, ULG, and Candy Kern-Fuller, jointly and severally, as their sole and separate obligations, and Michael Woodard and Deborah Woodard, as a community obligation, shall make restitution to the Commission in the principal amount of $371,191.23. Restitution shall be payable to the Arizona Corporation Commission within 90 days of the effective date of this Decision. Such restitution shall be made pursuant to A.A.C. R14-4-308 subject to legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that all ordered restitution payments shall be deposited into an interest-bearing account(s), if appropriate, until distributions are made.

IT IS FURTHER ORDERED that the ordered restitution shall bear interest at the rate of the lesser of 10 percent *per annum*, or at a rate *per annum* that is equal to one percent plus the prime rate as published by the Board of Governors of the Federal Reserve System of Statistical Release H.15, or any publication that may supersede it on the date that the judgment is entered.

IT IS FURTHER ORDERED that the Commission shall disburse the restitution funds on a *pro rata* basis to the investors shown on the records of the Commission. Any restitution funds that the Commission cannot disburse to an investor because the investor is deceased or an entity which invested is dissolved, shall be disbursed on a *pro rata* basis to the remaining investors shown on the records of the Commission. Any remaining funds that the Commission determines it is unable to or cannot feasibly disburse shall be transferred to the general fund of the State of Arizona.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2036, Respondent ULG shall pay to the State of Arizona administrative penalties in the amount of $240,000, of which $80,000 is for violations of A.R.S. § 44-1991, as a result of the conduct set forth in the Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2036, Respondent Candy Kern-Fuller shall pay to the State of Arizona administrative

penalties in the amount of $240,000 as a result of the conduct set forth in the Findings of Fact and Conclusions of Law. Respondent Candy Kern-Fuller shall also pay jointly and severally with ULG its administrative penalty of $80,000 for violations of A.R.S. § 44-1991, pursuant to A.R.S. § 44-1999(B).

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2036, Respondent PAC shall pay to the State of Arizona administrative penalties in the amount of $21,000, of which $7,000 is for violations of A.R.S. § 44-1991, as a result of the conduct set forth in the Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2036, Respondent Michelle Plant shall pay to the State of Arizona administrative penalties in the amount of $21,000 as a result of the conduct set forth in the Findings of Fact and Conclusions of Law. Respondent Michelle Plant shall also pay jointly and severally with PAC its administrative penalty of $7,000 for violations of A.R.S. § 44-1991, pursuant to A.R.S. § 44-1999(B).

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2036, Respondent FPD shall pay to the State of Arizona administrative penalties in the amount of $21,000, of which $7,000 is for violations of A.R.S. § 44-1991, as a result of the conduct set forth in the Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2036, Respondent Michael Woodard, as his sole and separate obligation, and Respondents Michael Woodard and Deborah Woodard, as a community obligation, shall pay to the State of Arizona administrative penalties in the amount of $21,000 as a result of the conduct set forth in the Findings of Fact and Conclusions of Law. Respondent Michael Woodard, as his sole and separate obligation, and Respondents Michael Woodard and Deborah Woodard, as a community obligation, shall also pay jointly and severally with FPD its administrative penalty of $7,000 for violations of A.R.S. § 44-1991, pursuant to A.R.S. § 44-1999(B).

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2036, Respondent Mark Corbett shall pay to the State of Arizona administrative penalties in the amount of $21,000 as a result of the conduct set forth in the Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that all administrative penalties shall be payable by either cashier's check or money order payable to "the State of Arizona" and presented to the Arizona Corporation Commission for deposit in the general fund for the State of Arizona.

IT IS FURTHER ORDERED that the payment obligations for these administrative penalties shall be subordinate to the restitution obligations ordered herein and shall become immediately due and payable only after restitution payments have been paid in full or upon Respondents' default with respect to Respondents' restitution obligations.

IT IS FURTHER ORDERED that if Respondents fail to pay the administrative penalties ordered hereinabove, any outstanding balance plus interest, at the rate of the lesser of ten percent *per annum* or at a rate *per annum* that is equal to one percent plus the prime rate as published by the Board of Governors of the Federal Reserve System in Statistical Release H.15 or any publication that may supersede it on the date that the judgment is entered, may be deemed in default and shall be immediately due and payable, without further notice.

IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order, any outstanding balance shall be in default and shall be immediately due and payable without notice or demand. The acceptance of any partial or late payment by the Commission is not a waiver of default by the Commission.

IT IS FURTHER ORDERED that default shall render Respondents liable to the Commission for its cost of collection and interest at the maximum legal rate.

IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order, the Commission may bring further legal proceedings against the Respondent(s) including application to the Superior Court for an order of contempt.

IT IS FURTHER ORDERED that pursuant to A.R.S. § 44-1974, upon application the Commission may grant a rehearing of this Order. The application must be received by the Commission at its offices within twenty (20) calendar days after entry of this Order. Unless otherwise ordered, filing an application for rehearing does not stay this Order. If the Commission does not grant a rehearing within twenty (20) calendar days after filing the application, the application is considered to be denied. No additional notice will be given of such denial.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN BURNS COMMISSIONER DUNN COMMISSIONER KENNEDY

COMMISSIONER OLSON COMMISSIONER MARQUEZ PETERSON

IN WITNESS WHEREOF, I, MATTHEW J. NEUBERT, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 12 day of November 2020.

MATTHEW J. NEUBERT
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____
MP/gb

SERVICE LIST FOR: PERFORMANCE ARBITRAGE COMPANY, INC., MICHELLE PLANT, FINANCIAL PRODUCT DISTRIBUTORS, LLC, MICHAEL DAVID WOODARD and DEBORAH G. WOODARD, MARK CORBETT, UPSTATE LAW GROUP, LLC, AND CANDY KERN-FULLER

DOCKET NO.: S-21049A-18-0223

Performance Arbitrage Company, Inc.
232 Market Street
Flowood, MS 39232

Financial Product Distributors, LLC
1250 S. Capital of TX Hwy,
Building 3, Suite 400
Austin, TX 78746

Mark Corbett
1614 Gateway Place
Rancho Mission Viejo, CA 92694

Michael David Woodard
c/o Financial Product Distributors, LLC
1250 S. Capital of TX Hwy,
Building 3, Suite 400
Austin, TX 78746

Michael David and Deborah G. Woodard
911 Presa Arriba Road
Austin, TX 78733

Michelle Plant
10 Marywood
Ward, AR 72176

Robert B. Zelms
MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP
3636 North Central Avenue, 11th Floor
Phoenix, Arizona 85012
Attorneys for Upstate Law Group, LLC and Candy Kern-Fuller
rbz@manningllp.com
dld@manningllp.com
Consented to Service by Email

Mark Dinell, Director
Securities Division
ARIZONA CORPORATION COMMISSION
1300 West Washington Street
Phoenix, AZ 85007
SecDivServicebyEmail@azcc.gov
Consented to Service by Email